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CITATIONS

Cases—Continued

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 471

THE CITY OF GREENWOOD, MISSISSIPPI, PETITIONER

v.

WILLIE PEACOCK, ET AL.

No. 649

WILLIE PEACOCK, ET AL., PETITIONERS

v.

THE CITY OF GREENWOOD, MISSISSIPPI

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinions of the court of appeals (R. 21–32, 96) are reported at 347 F. 2d 679 and 347 F. 2d 986. The opinions of the district court in these cases (R. 8–17, 67–71, 89–91, 92–94, 94–96) are not officially reported, but its opinion in a related case which was adopted by reference (R. 72–87) is reported at 237 F. Supp. 213.

JURISDICTION

The judgment of the court of appeals in the *Peacock* case (R. 33) was entered on June 22, 1965, and the judgment in the *Weathers* case (R. 96) on July 20, 1965. Cross-petitions for writs of certiorari were granted on January 17, 1966, 382 U.S. 971 (R. 97-98). The cases were consolidated and set for oral argument immediately following *Georgia* v. *Thomas Rachel, et al.*, No. 147, this Term, certiorari granted, 382 U.S. 808 (R. 98). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 1443 of Title 28, United States Code, provides:

> Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;
>
> (2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

QUESTIONS PRESENTED

1. Whether Section 1443(1) of the Judicial Code authorizes the removal to federal court of a State criminal prosecution founded on a State statute

which, although valid and non-discriminatory on its face, is applied so as to deny the accused a right under a law providing for equal civil rights.

2. Whether Section 1443(2) of the Judicial Code extends the remedy of removal to private persons with respect to a criminal prosecution arising out of their exercise of equal civil rights, and the associated rights of advocacy and protest.

INTEREST OF THE UNITED STATES

Together with *Georgia* v. *Rachel*, No. 147, this Term, these cases are the first under the civil rights removal statute to reach this Court since 1906. They are here by virtue of the provision of the Civil Rights Act of 1964 which, for the first time in three-quarters of a century, permits appeals from orders remanding cases removed pursuant to Section 1443. See 28 U.S.C. 1447(d), as amended. The questions presented are of obvious importance to those who are engaged in efforts to obtain the promise of equality for Negroes. Their resolution, moreover, may significantly affect the business of the federal courts. Accordingly, it seems appropriate that the United States express its views on the far-reaching issues involved.

STATEMENT

On April 3, 1964, the thirteen State court defendants in the *Peacock* case filed petitions for removal (R. 3) in which they alleged that each of them was a civil rights worker affiliated with the Student Non-Violent Coordinating Committee engaged in a voter registration drive in Leflore County, Mississippi aimed at encouraging the registration of Negroes.

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They recited that, on March 31, 1964, they were arrested in Greenwood and subsequently charged with obstructing public streets in violation of Section 2296.5 of the Mississippi Code. They alleged that the State statute invoked against them was unconstitutionally vague, that it was arbitrarily applied and used, and that its enforcement against them was "a part and parcel of the unconstitutional and strict policy of racial segregation of the State of Mississippi and the City of Greenwood" (R. 4), and on that basis asserted that they could not enforce in the courts of Mississippi their rights of free speech, free assembly, and the equal protection of the laws under the First and Fourteenth Amendments. They further generally alleged in the language of § 1443(1) that they were being "denied [and]/or cannot enforce in the courts of such State" their rights under laws providing for the equal rights of citizens, and in the language of § 1443(2) that because of their arrests they could not "act under * * * authority" of the First and Fourteenth Amendments and 42 U.S.C. § 1971 (dealing with the right to vote free from racial discrimination). The district court remanded the cases to the State court, holding that § 1443 "authorizes removal of a criminal case from a state court to a federal court only when the Constitution or laws of the state deny or prevent the enforcement of equal rights * * *." (R. 18). The Court of Appeals stayed the remand orders pending appeal (R. 19).

The fifteen State court defendants whose removals were consolidated in the *Weathers* case filed removal

petitions between July 23, 1964, and August 21, 1964 (R. 36–63). Their petitions were identical except for the specification of the State charges against them and brief descriptions of their conduct at the time of their arrests. The petitioners alleged that they were civil rights workers affiliated with the Council of Federated Organizations (COFO), the activities of which were "designed to achieve the full and complete integration of Negro citizens into the political and economic life of the State of Mississippi" (R. 37). They removed 21 separate charges against them. Three of the petitioners were arrested on July 16, 1964, while, according to their allegations, they were "peacefully picketing" at the Leflore County Courthouse in Greenwood (R. 38). They were charged with assault and battery (R. 36) and, in addition, petitioner Weathers was charged with interfering with an officer (R. 47). On July 31, 1964, two others were charged with operating motor vehicles with improper license tags while driving in Greenwood (R. 52, 61), a third who was riding as a passenger was charged with interfering with a police officer (R. 51), and a fourth, a member of a group "walking along the roadside singing songs" was charged with contributing to the delinquency of a minor and parading without a permit after obeying an officer's order to disperse (R. 53–54). On August 1 one of the petitioners was arrested and charged with assault while "engaged * * * in * * * voter registration activity, when he was accosted and assaulted in said exercise" (R. 59); another was charged with disturbing the peace while

engaged in COFO's "Freedom Registration" program (R. 55); and two others were charged with disturbing the peace while protesting police brutality "by word of mouth, pamphlets, and photographs" on a public street (R. 50). Others were charged on various dates with the use of profanity while on a public street (R. 57); disturbing the peace while participating in an economic boycott (R. 58) and assembling on a street (R. 62); inciting to riot while promoting an economic boycott of a grocery store the owner of which, a part-time policeman, had allegedly engaged in police brutality (R. 60); and assault and battery while at a police station making an inquiry during which "assault and battery was accomplished with the intent to intimidate and harass petitioner" (R. 63).

The petitioners in *Weathers* alleged that they had engaged in no conduct prohibited by any valid law or ordinance of the State or city (R. 38) and that their arrests and prosecutions were for the sole purpose of "harassing Petitioners and of punishing them for and deterring them from the exercise of their constitutionally protected right to protest the conditions of racial discrimination and segregation" in Mississippi (R. 38). Their petitions alleged denials of, or the inability to enforce in State court, equal rights protected by § 1443(1) because of practices of racial segregation and discrimination throughout the State of Mississippi in state courts, in the electoral process, and in the selection of jurors (R. 40-41). They further asserted a right to remove under

§ 1443(2) because the conduct for which they were arrested was "engaged in by them under color of authority derived from the Federal Constitution and laws providing for equal rights of American citizens" (R. 41) in that their acts were protected by the Equal Protection Clause of the Fourteenth Amendment and the free speech and assembly guarantees of the First and Fourteenth Amendments. They further alleged that the statutes under which they were charged are unconstitutionally vague or unconstitutional if construed to apply to their conduct, that the prosecutions had no basis in fact and were therefore groundless, and that there is no theory under which their conduct could lawfully be brought within the ambit of these statutes (R. 41–42). The district court on December 30, 1964, remanded the *Weathers* cases to the State court for the reasons stated in the *Peacock* opinion and in the district court's opinion in *City of Clarksdale* v. *Gertge* (R. 67–71, 89–91, 92–94, 94–96, see R. 72–87). The district court granted a stay of the remands pending appeal (R. 71, 91, 94).

The court of appeals, on June 22, 1965, reversed the order remanding the *Peacock* cases (R. 33) for reasons given in an extensive opinion (R. 21–32). On July 20, 1965, the court likewise reversed the remand orders in the *Weathers* cases by a *per curiam* decision invoking its opinion in *Peacock* (R. 96). The court in its *Peacock* opinion read the removal petition there to allege that a State statute "is being invoked discriminatorily to harass and impede appellants in their efforts to assist Negroes in registering to vote" in

violation of the equal protection clause (R. 24), and, on that basis, concluded that a ground for removal under § 1443(1) had been stated (R. 24–25). And the court accordingly remanded the cases to the district court with a direction that it permit the petition to prove that allegation, in which event the prosecutions should be dismissed (R. 32, 96).

The court went on, however, to reject petitioners' claim of a right to remove under § 1443(2). That conclusion was compelled by the court's view that private individuals, as distinguished from public officials and persons acting under their direction, cannot be said to be acting "under color of authority" of civil rights laws within the meaning of § 1443(2) (R. 29–32).

ARGUMENT

Introduction and Summary

A century ago the Negro won his freedom and was solemnly declared a citizen and an equal before the law. But, from the first, it was realized that no mere declaration—even if enshrined in the Constitution itself—would overcome resistance in the defeated States.[1] And so federal statutes were promptly en-

[1] See, *e.g.*, the statement of Senator Howard in January 1866 (Cong. Globe, 39th Cong., 1st Sess., p. 503):

> It was easy to foresee, and of course we foresaw, that in case this scheme of emancipation was carried out in the rebel States it would encounter the most vehement resistance on the part of old slaveholders. It was easy to look far enough into the future to perceive that it would be a very unwelcome measure to them, and that they would resort to every means in their power to prevent what they called the loss of their property under this amendment. We could foresee easily enough that they would use, if they

acted to vindicate the rights of the new freedmen. The majestic generalities of the new constitutional guaranties were given concrete content by positive legislation defining specific rights;[1] criminal laws were passed to punish disobedience, by officials[2] and private conspiracies[3] alike; civil remedies were provided for those who still would be denied;[4] and, in each instance, jurisdiction to implement the new laws was given to the federal courts.[5] There remained one further danger to guard against, however: the possibility that the Negro or his protector would be the victim of a hostile judicial system when he was

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should be permitted to do so by the General Government, all the powers of the State governments in restraining and circumscribing the rights and privileges which are plainly given by it to the emancipated negro.

See, also, the remarks of Representative Cook, *id.* at 1124–1125. The materials are collected in the exhaustive article of Professor Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 Pa. L. Rev. 793, at 808–828.

[1] *E.g.*, § 1 of the Civil Rights Act of 1866, 14 Stat. 27, and § 17 of the Enforcement Act of May 31, 1870, 16 Stat. 144, now 42 U.S.C. 1981, 1982. See, also, Brief for the Appellants in *Katzenbach* v. *Morgan*, No. 847, this Term, pp. 31–41.

[2] *E.g.*, § 2 of the Civil Rights Act of 1866, 14 Stat. 27, and § 17 of the Enforcement Act of May 31, 1870, 16 Stat. 144, now 18 U.S.C. 242. See, also, Brief for the United States in *United States* v. *Price*, Nos. 59 and 60, this Term.

[3] *E.g.*, § 6 of the Enforcement Act of May 31, 1870, 16 Stat. 141, now 18 U.S.C. 241. See, also, Brief for the United States in *United States* v. *Guest*, No. 65, this Term.

[4] *E.g.*, §§ 1 and 2 of the Ku Klux Act of April 20, 1871, 17 Stat. 13, now 42 U.S.C. 1983, 1985.

[5] *E.g.*, § 3 of the Civil Rights Act of 1866, 14 Stat. 27. See, also, *Monroe* v. *Pape*, 365 U.S. 167, 183; *McNeese* v. *Board of Education*, 373 U.S. 668.

brought before the State court as a defendant on a local charge.[7]

Two potential problems lurked in that situation. The first was that the suit or prosecution itself might be instituted and carried through in total disregard of the federal law which authorized the Negro to engage in the activity for which he was now sued and which directed federal officers to protect him in the enjoyment of his new equality. The other danger—perhaps more common—was that, even if the suit was justified, the defendant—because of his race or because of his cause—might not obtain a fair trial in the local court. There were many variants of the second situation. In the case of the Negro defendant, it might be the consequence of continuing local procedural rules which, in defiance of federal law, denied his race representation on the jury, or the right to testify, or some other courtroom prerogative enjoyed by whites. For both the Negro and his protector, the prejudice might come, less obviously, but as effectively, from local hostility to the cause of civil rights which could infect the whole judicial process in a community.

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[7] See, *e.g.*, the remarks of Senator Lane (Cong. Globe, 39th Cong., 1st Sess., p. 602):

> But why do we legislate upon this subject now? Simply because we fear and have reason to fear that the emancipated slaves would not have their rights in the courts of the slave States. The State courts already have jurisdiction of every single question that we propose to give to the courts of the United States. Why then the necessity of passing the law? Simply because we fear the execution of these laws if left to the State courts. That is the necessity for this provision.

See, also, the colloquy between Senators Hendricks, Stewart, Doolittle, and Clark, at *id.* 2063.

These are the cases that concern us here. The question is whether the architects of the first civil rights revolution left those problems without adequate solution.

It would be strange indeed if the great egalitarians of the Reconstruction decade overlooked so obvious a danger or failed in the attempt to devise an effective remedy. The men of the early post-War Congresses were realists, neither callous nor inept. We think it plain they saw the problem and solved it for each of the cases we have suggested by declaring a right of removal to a federal court. This is not to say that, for those cases in which a criminal prosecution was wholly unwarranted, more radical remedies were not also provided—by way of habeas corpus before trial [8] or injunctive relief.[9] But, for all other situations at least, the already familiar device of removal [10] was the obvious solution, because it both assured sufficient protection to the exercise of civil rights and involved the least impingement on State prerogatives. The

[8] § 1 of the Habeas Corpus Act of February 5, 1867, 14 Stat. 386, now 28 U.S.C. 2241(c)(3), 2251, discussed at some length in Amsterdam, *op. cit. supra*, at 819–825, 882–908. See *Fay* v. *Noia*, 372 U.S. 391, 415–419.

[9] See § 1 of the Ku Klux Act of April 20, 1871, 17 Stat. 13, now 42 U.S.C. 1983, which (insofar as it authorizes injunctive relief) may well have been intended as an exception to the rule, now embodied in 28 U.S.C. 2283, prohibiting a stay of State court proceedings. The question has been left open in this Court. See *Dombrowski* v. *Pfister*, 380 U.S. 479, 484, n. 2; *Cameron* v. *Johnson*, 381 U.S. 741.

[10] The earlier removal legislation is canvassed in this Court's opinions in *The Mayor* v. *Cooper*, 6 Wall. 247, and *Tennessee* v. *Davis*, 100 U.S. 257.

very appropriateness of the remedy strongly suggests it must have been intended to operate in the circumstances we are discussing.

What were the virtues of removal in this context? First, unlike habeas corpus or injunctive relief, it would not finally arrest a suit or prosecution that ought to be tried; in all instances in which the institution of the proceeding was not wholly unwarranted, the removal case could go forward in a changed forum, free of prejudice. Removal would not immunize the new freedman and his protectors from the rightful grievances of local suitors or place them beyond the reach of the State criminal law. Moreover, because the transfer would often be automatic, there would be little occasion for the federal judge to try his State court brother—an unseemly spectacle at best and one fraught with serious dangers of enervating Federal-State relations. In some cases removal would depend on the existence of hostile State legislation, avoiding any inquiry into the actual practices of the particular local judge. More often, the transfer would be effected simply because the alleged wrong had been committed in the course of civil rights activity, without stopping to finally determine, at this point, whether the defendant had indeed overreached the bounds of his federal privilege, much less whether, in the particular instance, the context of the case would really prejudice the trial. And, finally, because removal—unlike post-conviction habeas corpus or appellate review in this Court—is a pre-trial remedy, it would involve none of the friction inherent

in the procedures which permit federal courts to re-examine the decisions of State tribunals.

To be sure, the rule permitting removal in such circumstances would itself embody an unflattering implication against the State judiciary as a whole. But that impersonal distrust of local courts, made anonymously by the law as a matter of general regulation, could not carry the same sting. It would be merely a limited exercise of federal jurisdiction which the Constitution itself had condoned from the beginning;[11] and in time, it might come to be accepted as no more offensive than the diversity removal rule which had been in force since the first Judiciary Act of 1789.[12] On the other hand, removal was a swift and sure remedy against local prejudice—necessarily, a far more effective shield against discriminatory treatment of the freedmen attempting to assert their newly won rights than the ultimate revisionary power of this Court over the judgments of State tribunals.[13]

It is against this background that we must examine the contemporary legislation which provided for removal of "civil rights" cases. The problems of the time—still too familiar—and the knowledge that the Congress of that day was dedicated to resolving them, must inform the exegesis. To borrow the language of this Court in construing the Fourteenth Amendment itself—framed by the same men who wrote the statutes we examine—"[t]he true spirit

[11] See, *infra*, pp. 47–48.

[12] Act of September 24, 1789, § 12, 1 Stat. 73, 79.

[13] Cf. *Fay* v. *Noia*, 372 U.S. 391, 416. See also, *England* v. *Medical Examiners*, 375 U.S. 411, 416–417.

and meaning of the [provisions] cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they sought to accomplish," in light of which they should be "construed liberally." *Strauder v. West Virginia*, 100 U.S. 303, 306, 307. Whatever hesitation there may be to return to the spirit of 1866—as the normal rules of legislative construction in any event suggest—must yield to the unhappy truth that a century of cautious waiting has not removed the problem. Accordingly, we turn to the early provisions which, still today, supply a needed remedy.

The law of removal in this area derives from Section 3 of the very first Civil Rights Act, the Act of April 9, 1866 (14 Stat. 27). Despite several changes in terminology,[14] everyone agrees that the substance of the matter is circumscribed by the terms of this old statute and we are content to rest our argument on that text—reserving only the question of the rights protected which later revisions somewhat expanded.[15] In pertinent part, the removal section of the 1866 Act read as follows:

> * * * the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and

[14] See R.S. § 641; Judicial Code of 1911, § 31, 36 Stat. 1096; 28 U.S.C. 74 (1940); 28 U.S.C. 1443 (1948).

[15] See discussion, *infra*, pp. 53–56.

> criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any such person, for any cause whatsoever, or against any officer, civil or military, or other persons, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof, or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the "Act relating to habeas corpus and regulating judicial proceedings in certain cases," approved March three, eighteen hundred and sixty-three, and all acts amendatory thereof. * * * [16]

In terms, this provision grants a right of transfer to the federal court at the instance of a defendant

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[16] Inadvertently, in quoting this section, the opinion below (as reprinted in the City of Greenwood's petition for certiorari, p. 76, and the record here, R. 30, n. 7) omits from the second portion of the section the words "against any such person, for any cause whatsoever, or"—which, by reference back to the preceding clause, states the first ground of removal, now 28 U.S.C. 1443(1). The same error is repeated in the Brief for Respondents in *Georgia* v. *Rachel*, No. 147, this Term, p. 55. The provision is correctly reproduced in the Petition for Certiorari (App., p. 36) and the Brief for Petitioner in the same case (pp. 59–60).

called before a State court to answer a civil or criminal complaint in three distinct situations:

(1) When the defendant, *regardless of the nature of the case* ("for any cause whatsoever"), "[is] *denied or cannot enforce in the courts or judicial tribunals of the State or locality* * * * any of the rights secured to [him] by the first section of [the Civil Rights Act of 1866]" (all, in effect, aspects of the right to equal treatment by the law, in both substantive and procedural matters);[17]

(2) When the defendant, *whether he be "any officer, civil or military, or other person,"* is held to answer on account of "any arrest or imprisonment, trespasses or wrongs *done or committed by virtue or under color of authority* of [the Civil Rights Act of 1866 or the Freedmen's Bureau legislation]"[18]; and, finally,

(3) When the defendant (presumably a State official)[19] is sued or prosecuted "*for refusing to do any act* upon the ground that it would be inconsistent with [the Civil Rights Act of 1866]".

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[17] Section 1 of the Act declared Negroes citizens and conferred upon them "the same right * * * to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed, by white citizens, and [to] be subject to like punishment, pains, and penalties, and to none other * * *."

[18] Today, and ever since 1874, "any law providing for equal rights" replaces the bracketed words. See, *infra*, pp. 54–55.

[19] A restrictive reading of the "refusal" clause is suggested by its legislative history. The provision came in by amendment to the Civil Rights Act of 1866 and was explained by its

We are not here concerned with the last situation—involving as it does only the plight of the local official called to answer in his own court for refusing to obey the directives of local law or local superiors when they conflict with the supervening federal statute. It is worth noting, however, because it indicates that the framers of the Civil Rights Act of 1866 overlooked nothing. Our immediate focus is on the other two occasions for removal. There, if at all, we must find a remedy for the danger that a hostile local court would disregard the new privileges granted the Negro.

At the outset, it seems clear these provisions are broad enough to encompass all our cases—as one would expect in light of what has already been said concerning the problems of the time and the determination of the contemporary Congress to resolve them. This is not to say that there are not close questions of statutory construction involved. On the contrary, we freely concede that our reading of the text is, in some instances, less than assured. Permissible alternatives are perhaps equally plausible. We must, however, emphasize our belief that no construction would be faithful to the intent of the Thirty-Ninth Congress—or to the needs of the present—that withheld removal relief in any of the circumstances we have thus far

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sponsor in these words (Cong. Globe, 39th Cong., 1st Sess., p. 1367):

> I will state that this amendment is intended to enable State officers, who shall refuse to enforce State laws discriminating in reference to these rights on account of race or color, to remove their cases to the United States courts when prosecuted for refusing to enforce those laws. * * *

mentioned. With that important caveat, we return to the text and outline our analysis.

1. We first examine the provision (now 28 U.S.C. 1443(1)) which permits a State court defendant to remove the case against him if he "[is] denied or cannot enforce in the courts * * * of the State" one of the "egalitarian rights" protected by the removal statute (*infra*, pp. 21–36). In our view, the operative words govern two different problems: (1) the apprehension of the defendant that—because of his race and regardless of the context of the case—he will not be able to "enforce" his procedural rights at his forthcoming trial in the local court; (2) the situation of a State court defendant who has already been "denied" a protected right by being subjected to trial on a discriminatory or unfounded prosecution. We have no occasion here to urge reconsideration, for the first category of cases, of the restrictive rule of *Virginia* v. *Rives*, 100 U.S. 313, and the subsequent decisions of this Court that nothing short of a legislative directive will justify the delicate prediction that a State judge will violate his constitutional oath to render equal justice to all. But when the claim is that the initiation of a court proceeding of itself constitutes a present denial of protected rights, we submit that the removal statute requires the federal court to take over the case and to dismiss it if, after full inquiry, it is satisfied that the prosecution is discriminatory or wholly unwarranted.

2. Turning next (*infra*, pp. 36–53) to the second provision of the "civil rights" removal statute (now

28 U.S.C. 1443(2)), we attempt to show that it is not confined to federal officers acting under color of their office, but extends also to private persons who assert that the State proceedings against them arise out of their exercise of protected rights. In our view, an individual may be said to be acting "under color of authority" of a "law providing for equal rights" when he believes his conduct is privileged, and immunized against improper official interference, by overriding federal law. We suggest that the consequences of such a rule are not offensive to proper notions of federalism, emphasizing that removal in such cases does not abate the prosecution, but merely transfers the trial to another forum.

3. We consider, in a third section of our brief (*infra*, pp. 53–56), the scope of the rights protected by the removal statute. Although the original statute, so far as is relevant here, referred only to the rights declared by Section 1 of the Civil Rights Act of 1866 (now 42 U.S.C. 1981–1982), we think it proper, in this particular, to focus on the language of the Revised Statutes of 1874, carried forward in the present Judicial Code, which speaks of "right[s] secured" by, or acts done "under color of authority" of, "any law providing for equal rights." And we follow the uniform judicial construction of this phrase as intending an open-ended category. In our view, this leads to the conclusion that the rights protected by the removal statute includes those declared or secured by Sections 1971(a), 1981, 1982, 1985(3), 2000a and 2000e of Title 42 of the United States Code, at least

insofar as those provisions forbid inequality of treatment based directly or indirectly on race, as well as the corollary privilege to advocate the exercise of those rights and protest their denial. While we do not foreclose a broader reading, we suggest that, for present purposes, it is unnecessary to decide the difficult question whether other rights guaranteed by the Equal Protection and Due Process Clauses of the Fourteenth Amendment are also included within the scope of the removal statute.

4. Finally (*infra*, pp. 57–58), we address ourselves to the proper disposition of the cases before the Court. Because the cases are here on preliminary rulings, before any development of the facts which control the question of removal, there is little occasion to do more than suggest the guiding principles. If our submission with respect to the appropriate boundaries of the removal statute is correct, however, it is clear the cases must be remanded to the district court. In our view, an arguable basis for removal under both paragraphs of Section 1443 has been stated by each of the removal petitions. Accordingly, we suggest affirmance of the order below remanding the cases for a full hearing under Section 1443(1). But we submit that the ruling of the court of appeals denying removal under Section 1443(2) is erroneous, that it should be vacated, and that the district court, on remand, should be instructed to consider removal on this ground also, if petitioners fail to show that they are entitled to outright dismissal of the pending prosecutions.

A. THE "DENIAL" PROVISION OF THE REMOVAL STATUTE (28 U.S.C. 1443(1)) PERMITS PRE-TRIAL RELIEF AGAINST DISCRIMINATORY AND REPRESSIVE PROSECUTIONS

The first relevant provision of the statute (now 28 U.S.C. 1443(1)) turns removal on denial or inability to enforce one of the enumerated rights in the State courts. Without rejecting the forceful arguments to the contrary (see, *e.g.*, Sobeloff, J., dissenting in *Baines* v. *Danville*, No. 9080, C.A. 4, decided January 21, 1966, petition for certiorari pending, No. 959, this Term), we rest our own submission on the assumption that the words "denied" and "cannot enforce" both refer to action or anticipated action "in the courts or judicial tribunals of the State." That was the construction given the provision in *Virginia* v. *Rives*, 100 U.S. 313, 321, and, as a matter of textual analysis, it is difficult to quarrel with that reading. We are content to read the terms "denied" and "cannot enforce" as simply referring to different stages of the proceeding—the present and the future.[20] But that is, in itself, an important distinction. Indeed, it is obvious that very different considerations may govern according as the claim for removal rests on an accomplished fact—which can be closely examined—or, rather, on a mere predic-

[20] It may well be that, originally, when removal could be effected at any time, before or after trial, the term "denied" applied to denials both before and during trial—whereas, since the revision of 1874 confined the remedy to pre-trial, the defendant can only claim a denial before the trial begins. But, then as now, the tense of the verb ("is denied") always indicated a present denial, not a prediction. By contrast, "cannot enforce," in all versions of the statute suggests a future denial.

tion of future denial, where some danger of erroneous speculation is unavoidable.

1. "CANNOT ENFORCE"

We begin with the cases in which the allegation is that the defendant will not be able to enforce, at trial, a right within the protection of the removal statute. All the decisions in this Court—from *Strauder* v. *West Virginia* and *Virginia* v. *Rives, supra,* through *Kentucky* v. *Powers,* 201 U.S. 1—are of that character, each involving a claim by the defendant that he would not be able to vindicate his right to a nondiscriminatory jury. Indeed, the main thrust of the "cannot enforce" clause is to provide a remedy for the States court's anticipated refusal to recognize in the Negro the same procedural rights at his trial as are enjoyed by white citizens—a problem of more obvious acuteness in the day of the Black Codes. There are, however, other possible applications of the clause. To borrow an illustration from the context of 1866, we may suppose a State statute which, in defiance of the Civil Rights Act of that year, forbade the sale of land to a Negro and a prosecution of the seller for disregarding that law. If we assume that the State judge will feel bound to follow the law of his State,[21] this is plainly a case in which the defendant "cannot enforce" his federal right in the local tribunal and, hence, is entitled to removal. And the same reasoning, of course, applies to the perhaps

[21] We assume the local statute neither predated the federal enactment (see *Neal* v. *Delaware,* 103 U.S. 370), nor had been invalidated as unconstitutional (see *Bush* v. *Kentucky,* 107 U.S. 110).

more compelling modern case of the Negro who is charged under an unconstitutional local segregation ordinance for peaceably seeking service at a lunch counter covered by the Civil Rights Act of 1964.

The rule for these cases is a strict one under the old decisions of this Court. The doctrine of *Virginia* v. *Rives*—at least as construed in the later decisions—is that nothing short of a present (albeit unconstitutional) legislative directive can support the prediction that the State judge will refuse to accord the same procedural rights to the defendant as others enjoy or to recognize his substantive defense under a federal statute "providing for equal rights." There are strong arguments for relaxing that rule, although we concede the force of considerations which suggest limiting the occasions in which a federal judge is called upon to speculate that his Brother of the State court will be unfaithful to his constitutional oath. However, since the cases before the Court do not necessarily present the question, we abstain from any discussion of the proper scope of the "cannot enforce" clause.

Even if the rule of *Virginia* v. *Rives* were adhered to, however, it would follow that the whole of what is now subsection (1) of Section 1443 is obsolete. There are other applications of that provision—under the "denial" clause—which have special importance in the contemporary context.

2. "IS DENIED"

The more substantial question—and the one involved in the cases before the Court—is whether the

"denial" clause offers any relief when the State law on which a criminal charge is predicated is not void on its face, but is alleged to be unconstitutional as applied to the defendant in the circumstances. This Court has never had occasion to reach that issue. And it was in part in order to permit its authoritative resolution that Congress recently amended the civil rights removal statute by providing for appellate review of remand orders. See § 901 of the Civil Rights Act of 1964 (78 Stat. 266), now the proviso to 28 U.S.C. 1447(d), as amended. Senator Dodd, the floor manager with respect to the appeal provision, expressed the congressional attitude (110 Cong. Rec. 6955):

> Needless to say, by far the most serious denials of equal rights occur as a result not of statutes which deny equal rights upon their face, but as a result of unconstitutional and invidiously discriminatory administration of such statutes.
>
> * * * * *
>
> In particular, I think cases to be tried in State courts in communities where there is a pervasive hostility to civil rights, and cases involving efforts to use the court process as a means of intimidation, ought to be removable under this section.[22]

We agree. In our view, however, that result is not inconsistent with this Court's early decisions, which we read as construing the statute only as it

[22] See the similar speech by Congressman Kastenmeier, 110 Cong. Rec. 2770, and the remarks of then Senator Humphrey on this point, *id.* at 6551.

applies to claims alleging inability to enforce a right *in the future*, at trial. Our submission is that the circumstances described in the Senate debate involve a *present* violation of protected rights, removable under the "denial" clause of what is now Section 1443(1).

There are several variants of the situation, or, at least, the focus can be placed on differing aspects of the problem. Thus, one not unfamiliar case is that of the discriminatory prosecution, in which Negroes are charged under a State law or local ordinance which is valid on its face and permissibly applicable to the conduct in suit but which, in practice, is not applied in similar circumstances to white persons. See *Cox* v. *Louisiana*, 379 U.S. 536, 555-558; *Brown* v. *Louisiana*, No. 41, this Term, decided February 23, 1966 (concurring opinion of Mr. Justice White). On those facts—without noticing whether the defendant was at the time engaged in exercising a substantive right protected by the removal statute—it is clear that there has been a denial of the right to "be subjected" to "none other" but those "punishments, pains and penalties" imposed on "white citizens."[22] Another example is the prosecution under an otherwise valid local law (*i.e.*, a trespass statute) for conduct which is privileged under federal law (*i.e.*, peaceably seeking service at an establishment covered by Title II of the Civil Rights Act of 1964).

[22] We need hardly elaborate the proposition that, in some circumstances at least, a discriminatory prosecution constitutes unequal "punishment" within the meaning of the Civil Rights Act of 1866. See *Dilworth* v. *Riner*, 343 F. 2d 226 (C.A. 5).

Cf. *Georgia* v. *Rachel*, No. 147, this Term. Here, again, there is a denial of a protected federal right—whatever motive inspired the institution of the proceeding. And, finally, there is the case—related to each of the others, but distinguishable—in which a wholly unwarranted charge is brought to intimidate Negroes out of asserting rights within the removal statute. Ignoring the denial of due process inherent in the seizure and detention of the accused without cause, such a prosecution obviously impinges on the protected substantive right involved by violating the correlative right to be exempt from official threats designed to deter its exercise. See, *e.g.*, 42 U.S.C. 1971(b), 2000a-2(b), (c), and § 11(b) of the Voting Rights Act of 1965. Cf. 18 U.S.C. 241.

In each of these situations, it is plain that a right protected by the removal statute has been "denied" in a very real sense. Beyond the immediate injury inherent in being subjected to unfounded charges, it is sufficiently obvious that, in a "closed society" which sets the race apart, a discriminatory prosecution against Negroes, whatever its purpose, and, *a fortiori*, one that arises out of civil rights activity, will tend to have a repressive effect on the exercise of fundamental rights by the victim and others similarly situated—regardless of the prospects of ultimate acquittal. Cf. *Dombrowski* v. *Pfister*, 380 U.S. 479, 490, and cases there cited. The remaining question is whether a deprivation of covered rights which results from the institution of a formal prosecution is a "denial" within the intendment of the removal provision. We submit it is—although, as we elaborate in

a later section of our brief (pp. 36–52), we believe removal of all but the clearest of such cases is more appropriately effected under the "color of authority" provision, now 28 U.S.C. 1443(2).

At the outset, we stress, once again, that the claim under the "denial" clause is not that the defendant will be unable to enforce a right at his State trial, not yet commenced. The allegation here is, rather, that the institution of the prosecution, which requires him to stand trial, itself denies him a right protected by the removal statute. These cases involve no assessment of probabilities, no predication as to what the State judge will do. Accordingly, the rule of *Virginia* v. *Rives* and its progeny is inapplicable. Unlike the jury discrimination there involved, which was harmless unless the court endorsed it by denying a challenge (100 U.S. at 321–322), the present denial of rights in our cases has already inflicted injury before the trial concludes, indeed, before it begins. So, also, because the claim here is that the deprivation is an accomplished fact, the violation is susceptible of proof and does not depend on appraisal of the defendant's mere "apprehension" with respect to the forthcoming trial (*id.* at 320). And, finally, since the basis for removal in the circumstances we are discussing is not the anticipated unconstitutional action of the State court during the trial, we are not confronted—as the Court was in *Rives*—with the difficult and delicate problem of determining, in advance, whether the particular judge will respect his oath to uphold the Constitution.

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We conclude that the precedents in this Court do not stand in the way of our reading of the "denial" clause. But, wholly apart from those decisions, there remain three possible objections to our submission on this point. The questions raised are: (a) whether a deprivation of protected rights by the institution of a prosecution is a denial "in the courts or judicial tribunals of the State;" (b) whether removal is an appropriate remedy when the stated ground for the transfer is not apprehension as to the action of the State court but a present denial of protected rights through an unwarranted or discriminatory prosecution; and, finally, (c) whether a procedure which disposes of the case on the merits in determining removability is consistent with the general purpose of removal to permit the trial to proceed in an impartial forum. We consider each of these points in turn.

(*a*) It has been suggested with much force that the "denial" clause of the removal statute is not necessarily tied to the qualifying words "in the courts * * * of [the] State"—the point being illustrated by punctuating the relevant provision (which, in the successive re-enactments, has never been punctuated to resolve the inherent ambiguity) to say that removal is available to "persons who are denied [,] or cannot enforce in the courts or judicial tribunals of the State or locality where they may be [,] any right * * *." See the opinion of Sobeloff, J., dissenting, in *Baines* v. *Danville*, No. 9080, C.A. 4, decided January 21, 1966. As already noted, however, we prefer to rest our argument on the assumption that the

denial, present or future, must occur "in the courts * * * of the State or locality."

We submit that the institution of a formal prosecution meets that test. To be sure, it is normally the prosecutor who decides to make the charge—although, on occasion, in the police courts and justice of the peace courts typically involved in the cases that concern us, the initial official action may be that of the local judge issuing a summons or arrest warrant on the complaint of a peace officer, or a private citizen. But, at some stage before the commencement of the trial, a judicial officer or his delegate must intervene, whether to issue a warrant or summons, to commit the prisoner, to receive and file the complaint, or information, or indictment. Thus, the judicial machinery is necessarily involved when a formal prosecution is initiated. Doubtless, in most cases, the judge himself will have played a role—however small. That is not critical, however. The statute does not require that the denial be effected "by the judge"; it is enough if it occurs "in the court." While there may be violations of right in the arrest, or at other preliminary stages, the relevant denial for purposes of the removal statute is the initiation of an unwarranted *judicial proceeding*. And that condition is necessarily satisfied before the removal petition is filed since nothing less than a formal "suit or prosecution * * * commenced in a State court" is removable under the terms of the statute.

In sum, while the removal statute is always ultimately guarding against the improper action—or inaction—of the State judge, the immediate focus of the "denial" clause is on the locale, not on the actor. The deprivation of right here is the initiation of an unjustified court proceeding and it does not matter who set the case in motion—the judge himself, his clerk, the prosecutor or another officer of the court. Once the illegal prosecution becomes a formal "case", the denial is complete and the proceeding is removable.

(*b*) One may well ask what purpose is served by removal if rights have already been finally denied and no action of the State court can remedy the wrong. The answer is, of course, that removal is authorized in these situations because, although an irremediable injury has been inflicted, it may yet be *aggravated* by compelling the defendant to suffer an unwarranted trial, or simply by holding him under improper charges, perhaps incarcerated, for an extended period pending trial. The underlying fear is that the State judge will not promptly dismiss the prosecution as he should. That is a risk which the law determines, as a matter of general policy, to avoid, in light of the urgent need to arrest further injury to one already deprived of important federal rights. In this sense, the possibility of prejudice—or unconcern—on the part of the local judge is, once again, the ultimate rationale of the transfer to a federal court. But that is not the technical ground for removal with respect to a defendant who has already

suffered injury. He must show a present denial of protected rights in that he is a victim of the unequal enforcement of State law or of an otherwise unwarranted prosecution interfering with his exercise of such rights. He need not also prove (or even allege) that the injury will be compounded by the action of the State court in failing to grant swift relief; the law itself supplies that ingredient in these circumstances.

(c) Successful invocation of the "denial" clause of the removal statute, as we construe it, inevitably results in pre-trial dismissal of the case, rather than trial in a new forum; in these cases, the decision denying remand, which determines removability, at the same time finally disposes of the case, sometimes on the merits of the plea of privilege or justification. There is some basis for the charge that such a procedure resembles more injunctive relief against State court proceedings than removal of a cause to the federal forum. Indeed, the radical character of the relief suggests that it be used sparingly. But it is, nevertheless, a proper aspect of removal, fully warranted by the statute and a very appropriate remedy in extreme circumstances.

There is, of course, no fixed rule that a removed case must proceed to trial on the merits. Obviously, if an absolute bar to the prosecution is claimed, it must be heard and determined before trial—in whatever court the proceeding is pending—and if the objection is sustained no trial will ensue. In every removable case, the defendant may transfer the hear-

ing of that threshold question to the federal court," where the proceeding will end if the plea is sustained. It is common experience to have the removed case concluded at this stage. See, *e.g.*, *O'Campo* v. *Hardisty*, 262 F. 2d 621 (C.A. 9); *De Busk* v. *Harvin*, 212 F. 2d 142 (C.A. 5). Thus, here, the removal, although it does not look to a trial in the federal court, serves

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[24] The present statute, applicable to all categories of removal, expressly provides that a criminal prosecution may be removed "at any time before final judgment." 28 U.S.C. 1447(c). That has been the rule for civil rights cases at least since the Revised Statutes of 1874, which authorized removal "at any time before the trial or final hearing of the cause." R. S. 641. Indeed, originally, removal of civil rights cases, if sought before judgment, could be effected only at the very inception of the court proceeding, "at the time of [the defendant's] entering his appearance in [the State] court." § 5 of the Act of March 3, 1863, 12 Stat. 755, 756, adopted by reference in § 3 of the Civil Rights Act of 1866 (*supra*, p. 15). The harshness of this rule led to a provision in § 3 of the amendatory Act of May 11, 1866, 14 Stat. 46, permitting removal "after the appearance of the defendant and the filing of his plea or other defence in [the State] court, or at any term of said court subsequent to the term when the appearance is entered, and before a jury is empannelled to try the [case]."

Under present law, then, the defendant has an option. If the bar to the prosecution is not also the ground of removal, the defendant may choose to await the State court's ruling on his preliminary plea and, after its denial, remove the case to the federal court "before trial." It is not clear, however, whether submission of the threshold issues would prevent their relitigation, after removal, in the federal district court. In civil cases, the State court rulings before removal have been treated as binding on the ground that the federal trial court is not a reviewing court. *McDonnell* v. *Wassenmiller*, 74 F. 2d 320 (C.A. 8); *Scheel* v. *New York Life Ins. Co.*, 79 F. Supp. 463 (D. Tenn.); cf. *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 427–428; *England* v. *Medical Examiners*, 375 U.S. 411, 417–418. On the other hand, it is arguable that such rulings are merely tentative, subject to reex-

the important function of transferring to that forum the equally critical adjudication of the plea in bar to the prosecution, which is grounded on federal law.

To be sure, in other situations, the pretrial dismissal in the federal court normally occurs after final removal of the cause, not as an incident of the determination of removability on a motion to remand. Here, too, the apparent incongruity might be avoided by turning removability on the mere allegations of the petition, or on a "prima facie" showing—as is the rule with respect to removal of prosecutions against

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sideration until final judgment, and that the federal court succeeds to the power of the State tribunal to reverse itself. Because we deal here with criminal cases, it may also be permissible to view the removal court as akin to a federal habeas corpus court which may re-examine the facts underlying the State court's disposition of these legal issues. *See England* v. *Medical Examiners*, *supra*, at 417, n. 8.

But, in any event, the defendant whose "motion to quash" or "motion in bar" rests on the same ground as his petition for removal has nothing to gain by submitting his claim initially to the State court. Even if an adverse ruling there does not preclude him from presenting the same contention to the federal court (and thereby bar removal *ab initio*), he has not added to his claim of "denial" by showing that the State court has preliminarily endorsed the violation of his protected rights. For, whether or not the federal court may vacate the ruling after removal, it is clear the State court might do so if the case remained there. Indeed, the early decisions of this Court reject a claim of denial of rights based on a refusal by the State trial court to set aside an indictment returned by a discriminatorily selected grand jury or to quash a similarly drawn petit jury panel—final rulings, as a practical matter—on the ground that an *appellate court* of the State might correct the error. See *Bush* v. *Kentucky*, 107 U.S. 110; *Smith* v. *Mississippi*, 162 U.S. 592; *Murray* v. *Louisiana*, 163 U.S. 101; *Williams* v. *Mississippi*, 170 U.S. 213.

federal officers. See *The Mayor* v. *Cooper*, 6 Wall. 247, 253–254; *Tennessee* v. *Davis*, 100 U.S. 257, 262; *Maryland* v. *Soper* (*No. 1*), 270 U.S. 9, 34–36; *Maryland* v. *Soper* (*No. 2*), 270 U.S. 36, 38–39. Indeed, that may have been the original design with respect to civil rights cases also, the first removal statutes in this area including no provision for remand. But there can hardly be objection because the modern rule is more cautious and imposes a heavier burden on the removal petitioner. It is of course a mere coincidence that the jurisdiction of the federal court is usually determined on a motion to remand. The judicial Code is explicit that remand is required if the impropriety of the removal "appears" "at any time before final judgment." 28 U.S.C. 1448(c). Thus, the return of the case would be compelled if the removal court's want of jurisdiction came to light in connection with any pretrial proceedings, whether or not a motion to remand had been submitted. In any event, there is no real anomaly in confusing the question of removability and the merits of the challenge to the prosecution. There are many instances in the law where a procedural or jurisdictional issue is so bound up in the merits that it cannot be decided separately. See, *e.g.*, *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 687–688, 694–695.

It would be an exaggeration, however, to say that removal and dismissal of the case exactly coincide under the suggested reading of the "denial" clause. The case is removed by filing the petition in the federal

court and a copy with the clerk of the State court, and that action automatically stays further proceedings in the local court. 28 U.S.C. 1446(e). That is a safeguard of some importance. Moreover, if the defendant is confined, the removal judge must, without awaiting the remand hearing, issue a writ of habeas corpus to transfer the prisoner to federal custody, and may then enlarge him on bail. 28 U.S.C. 1446(f). And, of course, the federal court acquires jurisdiction to consider the merits of the petitioner's claim before the allegations are proved. Cf. *Bell* v. *Hood*, 327 U.S. 678. Thus, removal, for some purposes, is effected quite independently of the ultimate decision in the case. It is only at the end that the jurisdictional question merges into the disposition of the case.

We conclude that there are no obstacles to a reading of the "denial" clause of the removal statute which would permit a transfer of a criminal case on the ground that the underlying prosecution violates rights guaranteed by a federal law "providing for equal rights." It need hardly be added that our submission assumes the federal court will act with restraint. We take it for granted that the court cannot subsitute itself for a trial jury, deciding questions of fact not open on a pretrial motion to quash the prosecution: we claim no special powers for the court merely because it is determining "removability" in a proceeding labelled "hearing on motion to remand." A proper regard for the principle of federalism requires the caveat. But, once that is clear, there can be no rightful claim of undue impingement on State pre-

rogatives. Certainly, the State cannot complain because the issue of jurisdiction is always open and the final decision to exercise it awaits actual proof of the petitioner's allegations, to the same degree as is required for dismissal of the case without trial.

B. THE "COLOR OF AUTHORITY" PROVISION OF THE REMOVAL STATUTE (28 U.S.C. 1443(2)) IS AVAILABLE TO PRIVATE DEFENDANTS

The second removal provision of the Civil Rights Act of 1866 (*supra*, p. 14–15)—carried forward in paragraph (2) of Section 1443—allowed "any officer, civil or military, or other person" to transfer to the federal court a suit or prosecution initiated against him on account of "any arrest, imprisonment, trespasses or wrongs done or committed by virtue or under color of authority" of the 1866 Act or the legislation relating to the Freedmen's Bureau. This Court has had no occasion to consider the reach of this provision. Recently, however, the question whether paragraph (2) of Section 1443 extends any protection to private defendants not acting under compulsion of federal law has been answered in the negative by a divided panel of the court of appeals for the Second Circuit (*New York* v. *Galamison*, 342 F. 2d 255 (C.A. 2), certiorari denied, 380 U.S. 977), a panel of the Third Circuit (*City of Chester* v. *Anderson*, 347 F. 2d 823, petition for certiorari pending, No. 443, this Term),[28] a majority of the Fourth Circuit (*Baines* v. *Danville*, No.

[28] The question was not reached in the dissenting opinion of Chief Judge Biggs and Judges Kalodner and Freedman on the petition for rehearing in that case. See 347 F. 2d at 825.

9080, C.A. 4, decided January 21, 1966, petition for certiorari pending, No. 959, this Term),[11] and, in the decision below (R. 21, at 29–32), a panel of the Fifth Circuit.[12] We submit these decisions are erroneous and that the provision grants a right of removal to a private person with respect to criminal charges arising out of his exercise of federal rights or privileges secured by "any law providing for equal rights."

Certainly, the words of the statute permit this construction. It is in terms provided that "any * * * person" may remove a "prosecution" brought against him "for any * * * trespasses or wrongs done or committed * * * under color of authority" of the Civil Rights Act of 1866, or, today, any other federal law "providing for equal rights." Historical connotations and judicial gloss aside, the phrase "under color of authority of law," as a matter of plain English, includes conduct which the actor claims he is privileged to engage in by a provision of law—for instance, to enter and seek service at a covered restaurant immune from the local trespass law, as the recent federal public accommodations statute "authorizes" him to do. And it is equally clear that any charge arising out of such an assertion of rights is embraced within the words "trespasses, or wrongs"—assuming we are bound by the terms of the original statute, rather than the present text which permits

[11] Judges Sobeloff and Bell, dissenting, did not decide the question. But, see, —— F. 2d at ——, n. 54.

[12] The Fifth Circuit did not consider the scope of paragraph (2) in *Rachel* v. *Georgia*, 342 F. 2d 336, No. 147, this Term, or *Cox* v. *Louisiana*, 347 F. 2d 679.

removal of a prosecution "for any *act* under color of authority * * *."

We do not say no other conclusion is possible as a matter of language. But, in light of the general rule that removal statutes are to be liberally construed (*Venable* v. *Richards*, 105 U.S. 636, 638; *Colorado* v. *Symes*, 286 U.S. 510, 517) and the special reasons in the history of the times for anticipating the broadest remedies in the Civil Rights Act of 1866 (see *Blyew* v. *United States*, 13 Wall. 581, 593), it would seem to be enough that the text reasonably lends itself to a reading that extends the relief specified to the freedman himself, the intended beneficiary of the legislation as a whole. Only the most compelling evidence would justify a contrary result. We find none.

There is nothing relevant to our question in the legislative history of the Act of 1866,[28] except as already noted, unequivocal indications of the strong distrust of the State courts entertained by the Thirty-Ninth Congress[29] and its obvious determination to shield the Negro from their hostility. The arguments for a narrow construction of the "color of authority" clause look elsewhere. In sum, three contentions are put forward: (1) That the language of the provision, read in the light of the 1866 Act as a whole, indicates an exclusive concern here with federal officers and persons acting under them; (2) that any reading of what is now the second paragraph of Section 1443 to include private individuals would make

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[28] See Amsterdam, *op. cit. supra*, at 811.

[29] See *supra*, pp. 9–10, and note 7, *supra*, p. 10.

it overlap the first provision (now § 1443(1)) and leave that text without function; and, finally (and somewhat inconsistently), (3) that the suggested construction would permit such a wholesale removal of cases as to destroy the Federal-State balance.

1. Of course, if need be, the reference to "other persons" as entitled to remove their cases could be explained away as intending "persons acting under direction of" the first mentioned "officer[s], civil or military." This is permissible in light of the provisions of the Civil Rights Act of 1866 and of the Freedman's Bureau legislation authorizing the summoning of "bystanders" and the formation of a "posse commitatus" for various purposes.[10] Unless there are independent reasons for doing so, however, we submit a straightforward reading of "any * * * other person" as meaning just that is more natural. The same Congress, in the same year, showed that it knew how to qualify "other person" when it wished to by providing, with respect to revenue officers, for removal of civil and criminal actions against those officers "or against any person acting under or by authority of any such officer." Act of July 13, 1866 § 67, 14 Stat. 98, 171.[11] To be sure, if the clause we are discussing meant to reach all persons it might have omitted special mention of "officer[s], civil or military"—who are presumably included in the generic term "any person"—or it might have used the

[10] See, *e.g.*, §§ 4–10 of the Civil Rights Act of 1866, 14 Stat. 27, 28–29.

[11] This was the provision sustained in *Tennessee* v. *Davis*, 100 U.S. 257, as then codified in the Revised Statutes, § 643.

still shorter solution of the 1948 Revisers of the Judicial Code who eliminated all reference to the removal petitioner in the modern version of the provision. See 28 U.S.C. 1443(2). But economy of phrasing was not always a part of the style of the times. See, *e.g.*, the Enforcement Act of May 31, 1870, 16 Stat. 140, and the amendatory Act of February 28, 1871, 16 Stat. 433. Nor would it have been altogether safe to make no explicit mention of officers: four members of this Court once read a Reconstruction statute as not reaching official acts partly because officers were not named. *United States* v. *Williams*, 341 U.S. 70 (Opinion of Frankfurter, J.). But, see, *id.* at 87 (Opinion of Mr. Justice Douglas) and *United States* v. *Price*, Nos. 59, 60, this Term, decided March 28, 1966.

An alternative textual argument for the narrow reading lays stress on the words "color of authority," insisting that this is "a phrase of art in the law" which connotes "authority derived from an election or appointment." See the opinion of the district court in *City of Clarksdale* v. *Gertge* (N.D. Miss.), reprinted here (R. 72, at 84), which is the basis for the decision of the instant cases in that court (see R. 30, 70, 90, 93, 95). That construction, we submit, is far from obvious. There might be merit in the contention if the clause ended abruptly after describing the acts supporting removal as those "done under color of authority," leaving us free to assume that the "authority" mentioned derived from the status, position or *office* of the actor. But that is not our

provision. The text before us very plainly tells us the source of the "authority": it is not the office of the defendant, but the *law* under which he acts—today, "under color of authority derived from any law providing for equal rights." That the Thirty-Ninth Congress knew the difference is again shown by looking to the Act of July 13, 1866, which permits removal of a case against a revenue officer "on account of any act done under color of his office." *Id.*, § 67, 14 Stat. 171.

We are not aware of any legal tradition that forbids reading "under color of authority [of] law" to include the case of a private person who acts under the claim that the law grants him a privilege to engage in the conduct in question and immunizes him from prosecution for so doing (so long as he does not overstep the bounds of his legal privilege). There is nothing to the contrary in the decisions of this Court construing the expression "under color of * * * law" when used in Reconstruction legislation in reference to action taken under pretense of State law—even assuming the provisions there involved, enacted with a wholly different objective, are relevant to the present inquiry. The principal thrust of those cases is that acts done "under color of office" which violate State law are nevertheless committed "under color of law." See *United States* v. *Classic*, 313 U.S. 299, 325–329; *Screws* v. *United States*, 325 U.S. 91, 107–112; *Williams* v. *United States*, 341 U.S. 97, 99–100; *Monroe* v. *Pape*, 365 U.S. 167, 172–187. But it does not follow, because "under color of law" includes

illegal acts of officials, that those words do not also encompass the conduct of private individuals invoking the authority of local law to violate federal rights. See *Civil Rights Cases*, 109 U.S. 3, 16. Such cases are rare today. But, cf. *Terry* v. *Adams*, 345 U.S. 461; *Gayle* v. *Browder*, 352 U.S. 903; *Burton* v. *Wilmington Pkg. Auth.*, 365 U.S. 715; *Petersen* v. *Greenville*, 373 U.S. 244. More often, private conspiracies against federal rights are wholly outside the law, and, hence, beyond the reach of the "under color" statutes. Cf. *United States* v. *Guest*, No. 65, this Term, decided March 28, 1966. It is doubtless for this reason that provisions like Section 242 of the Criminal Code and its civil counterpart, 42 U.S.C. 1983, are commonly viewed as shields against violations by State officers.[11] Yet, as their draftsmen made clear at the beginning, these statutes were directed also at "the meanest man in the streets [who] covers himself under the protection or color of a law or regulation, or constitution of a State," one of the objects being to "prevent any private person from shielding himself under a State regulation."[12] Cong. Globe, 41st Cong., 2d Sess., p. 3663.[13] Certainly, the "color of

[11] When those provisions are invoked against a violation of Fourteenth Amendment, they may have a narrower reach, wholly apart from the limits of "under color of law," because the right sought to be vindicated is guaranteed only as against "State action." No comparable inhibition operates with respect to the removal statute.

[12] This statement by Senator Sherman was made with reference to the bill that became the Enforcement Act of May 31, 1870 (16 Stat. 140) which, in §§ 17 and 18, re-enacted and extended Section 2 of the Civil Rights Act of 1866 (14 Stat. 27), the

authority of law" clause of the removal statute cannot have been intended to have a more restrictive scope.

2. The claim of overlapping between the two provisions of the removal statute—if the second (now § 1443(2)) is read to include private individuals—is difficult to appreciate. It is said that the construction we urge for the "color of authority" clause "would bring within its sweep virtually all the cases covered by [what is now] paragraph (1) [of § 1443], thereby rendering that paragraph of no purpose or effect," and the suggestion is made that allowing private persons to remove prosecutions under the second provision would allow them to "avoid" the requirement of the other provision that the petitioner show a "denial" of protected rights or an "inability to enforce" them in the State court. R. 32. See, also, *New York* v. *Galamison*, 342 F. 2d 255, 264 (C.A. 2). We submit both propositions proceed on a false assumption.

The fact is that the coverage of the two provisions is essentially different and, as a matter of history at

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progenitor of 18 U.S.C. 242. He reiterated the thought that "persons" as well as "officers" could discriminate "under color of existing State laws, under color of existing State constitutions" in the same colloquy. Cong. Globe, 41st Cong., 2d Sess., p. 3663. See, also, Senator Trumbull's statement with respect to the meaning of "color of law" in the 1866 Act. Cong. Globe, 39th Cong., 1st Sess., p. 1758. Section 1 of the Ku Klux Act of April 29, 1871 (17 Stat. 13), which became 42 U.S.C. 1983, was represented by its sponsor to have the same reach, so far as is relevant here, as § 2 of the 1866 Act (now 18 U.S.C. 242). Cong. Globe, 42d Cong., 1st Sess., App. 68. See *Monroe* v. *Pape*, *supra*, at 185.

least, the cases within the reach of each were far from the same. The "cannot enforce" clause of what is now the first paragraph of Section 1443 was, and is (as we have seen), essentially a guarantee against the failure of the State courts to respect specific *procedural* rights—a matter wholly outside the scope of the "color of authority" provision, however construed. If such cases are rare today—at least those which satisfy the *Rives-Powers* rule—they were a real concern to the Congress of 1866. We must remember that removal on this ground does not in the least depend on the nature of the acts underlying the suit or prosecution and that it was provided primarily for the benefit of the freedman who suffered legal disabilities in the State court on account of his race or former conditions, whether or not the case arose out of his attempt to assert his new substantive rights. On the other hand, those who have reason to fear discriminatory treatment in the local court only because the case against them grows out of their exercise of federal rights cannot claim removal under the "inability to enforce" clause unless State law directs the court to disregard the federal defense. Thus, as between the "cannot enforce" clause and the "color of authority" provision there is no necessary overlap. This alone rebuts the suggestion that extending what is now paragraph (2) of Section 1443 to private persons would render the first paragraph "of no purpose or effect."

But what of the "denial" clause, now part of the first paragraph of Section 1443? Of course, if it

were to be read as adding nothing to the words "cannot enforce," no different situation is presented. In that event, however, the historic purposes of the removal statute as a whole would rather plainly forbid restricting the benefits of the "color of authority" clause to officers and their helpers. Although the reasons are less compelling, we submit that result would offend the original scheme even under our broader construction of the "denial" clause.

Of the three situations we have suggested as justifying removal under the "denial" clause (*supra*, pp. 25–26), one is clearly not within present Section 1443(2): the case of the discriminatory prosecution with respect to conduct that is not protected by a "law providing for equal rights." That category includes all instances in which there is unequal enforcement of an otherwise valid law against the Negro merely on account of his race. And, depending on how one defines the exercise of "equal rights" (*infra*, pp. 53–56), it encompasses a more or less substantial group of cases in which the prosecution is discriminatorily aimed at suppressing conduct which is not within the protection of the second paragraph of Section 1443. Here no possible overlap results because we extend the "color of authority" provision to private persons. Nor is there any real duplication of remedies for most of the cases within our reading of this last provision.

Indeed, the "color of authority" clause, as we understand it, is intended for the case in which the defendant is engaged in asserting equal rights and is

charged, perhaps as any one else might be for comparable conduct, under circumstances which make a jury issue whether he overreached his federal privilege. Assuming, as we do, that only the clearest instance of an unfounded prosecution should be disposed of by the judge alone on the ground that the unwarranted charge is itself a "denial" of right, there will remain many closer cases where trial is indicated, but local prejudice against the defendant's cause makes it essential to have the merits of the federal defense decided on appropriate instructions in the federal court. That is the situation for which the "color of authority" provision was written and it should be permitted to serve that important function today—reserving for the more radical procedure of the "denial" clause only the most egregious cases.

Thus, as we read them, the provisions of the two paragraphs of Section 1443 deal with basically different situations. To be sure, a given case may combine several grounds of removal and make it possible for the defendant to invoke both provisions, or either. But the existence of alternative remedies in this area is no ground for denying one of them. See *In re Neagle,* 135 U.S. 1, 60–61. Nor is some overlapping unusual in Reconstruction legislation. See *United States* v. *Mosley,* 238 U.S. 383, 387. See also, Brief for the United States in *United States* v. *Price,* Nos. 59, 60, this Term. Moreover, if overlapping is a real concern, a more serious instance of it would result today if paragraph (2) of Section 1443 were confined to officers and persons acting under them, for it would

then stand as wholly superfluous in light of the general officer removal provision of the Judicial Code which immediately precedes it. See 28 U.S.C. 1442(a)(1). We agree with the 1948 Revisers that the "color of authority" clause of the civil rights removal statute is something more than a redundant statement of a special instance of officer removal."

3. It would be shocking to suggest that considerations of federalism forbid transfer to federal courts of cases in which federal rights will otherwise be trampled and justice denied. That would amount to conceding that State prerogatives may override the Constitution, reversing the principle of constitutional supremacy. Of course, in most cases, this Court stands in the way of a permanent abridgment of federal rights, empowered as it has been since its creation to review the judgments of State courts insofar as they adjudicate federal questions. See *Martin* v. *Hunter's Lessee,* 1 Wheat. 304; *Cohens* v. *Virginia,* 6 Wheat 264. But as Madison observed during the constitutional debates, if that were the only recourse, "appeals would be multiplied in a most oppressive degree" and effective vindication of federal rights might fail because it would be difficult to revise, and often pointless to remand for a new trial, judgments founded on "improper Verdicts in State tribunals obtained under the biassed directions of a dependent Judge, or the local prejudices of an undirected jury." 1 Farrand,

"It is also instructive that the compilers of the Revised Statutes of 1874 preserved the "color of authority" clause as a part of the civil rights removal provision, R.S. § 641, rather than incorporating it into the officer removal section, R.S. § 643.

Records of the Federal Convention of 1787 (1911), p. 124. That is why the Constitution authorized Congress to "ordain and establish" "inferior Courts" (Art. III, § 1) which might be directed to exercise "the judicial Power of the United States" in cases "arising under [the] Constitution [and] the Laws of the United States" (Art. III, § 2, cl. 1).

Such was the balance struck at the beginning. From the first, Congress might have reserved to the courts of the United States exclusive jurisdiction of all cases in which a non-frivolous federal claim was made, whether by the plaintiff or the defendant. See *The Mayor* v. *Cooper*, 6 Wall. 247, 251–252. Thus, it was no invasion of States' rights when, at length, Congress transferred to the federal courts a small part of their potential jurisdiction by permitting removal of one category of disputes in which a federal defense is asserted. As was said in another connection, "it is only because the Congress of the United States, through long habit and long years of forbearance, has, in deference and respect to the States, refrained from the exercise of these powers, that they are now doubted" (*Ex parte Yarbrough*, 110 U.S. 651, 662). It is appropriate to repeat here the broad language of the Court in *Tennessee* v. *Davis*, 100 U.S. 257, 266–267, in sustaining the constitutionality of another removal provision:

> The argument so much pressed upon us, that it is an invasion of the sovereignty of a State to withdraw from its courts into the courts of the general government the trial of prosecutions for alleged offences against the criminal

laws of a State, even though the defence presents a case arising out of an act of Congress, ignores entirely the dual character of our government. It assumes that the States are completely and in all respects sovereign. But when the national government was formed, some of the attributes of State sovereignty were partially, and others wholly, surrendered and vested in the United States. Over the subjects thus surrendered the sovereignty of the States ceased to extend. Before the adoption of the Constitution, each State had complete and exclusive authority to administer by its courts all the law, civil and criminal, which existed within its borders. Its judicial power extended over every legal question that could arise. But when the Constitution was adopted, a portion of that judicial power became vested in the new government created, and so far as thus vested it was withdrawn from the sovereignty of the State. Now the execution and enforcement of the laws of the United States, and the judicial determination of questions arising under them, are confided to another sovereign, and to that extent the sovereignty of the State is restricted. The removal of cases arising under those laws, from State into Federal courts, is, therefore, no invasion of State domain. On the contrary, a denial of the right of the general government to remove them, to take charge of and try any case arising under the Constitution or laws of the United States, is a denial of the conceded sovereignty of that government over a subject expressly committed to it.

Against these considerations, it cannot matter what the volume of removed litigation may be if the "color of authority" clause affords the remedy to private individuals defending on the ground of federal privilege conferred by a "law providing for equal rights." Without attempting to predict the practical scope of the provision, however, it is proper to notice several factors which may reduce the apprehended number of such transfers.

First, it must be remembered that removal is an optional privilege. Since, under the "color of authority" clause, a trial is anticipated whatever court entertains the cause, the defendant will only assert his right of transfer if he has cause to fear unfair treatment at the hands of the State court. Removal to the federal court may present delays and inconveniences which the defendant will prefer to avoid if he is confident of a fair trial in the local forum. The volume of cases actually removed will depend, in large measure, on the willingness of the State courts to respect, where they fail to do so now, the supremacy of federal substantive rights and the principle of equal justice for all.

Second, we emphasize that our reading of the clause does not permit removal of every case arising out of an assertion of any federal right. In response to the conditions prevailing at the time of its enactment (and still too familiar), the statute focuses only on rights of equality. That may include a more or less broad category of cases. But, as we discuss hereafter (*infra*, pp. 53–56), we do not think it encompasses all

instances in which the defense is predicated on the guarantees of the First Amendment or other rights protected against State abridgment by the Due Process Clause of the Fourteenth Amendment. That necessary limitation sufficiently reduces the proportions of the question.

Finally, we do not suggest that the federal court should retain a case against challenge merely because the removal petition on its face alleges in conclusory terms that the charge arises out of the exercise of rights under a "law providing for equal rights." Of course, the allegation must be plausible. But more than that, the conclusion, if disputed, must be supported by a statement of particularized facts, as is required under the officer removal provisions. See *Maryland* v. *Soper* (*No. 1*), 270 U.S. 9; *Colorado* v. *Symes*, 286 U.S. 510. Under modern rules of pleading, it does not matter whether those details are bared in the original petition, or are furnished by amendment or in some other way. This is not to say that under the "color of authority" provision the petitioner must prove the validity and sufficiency of his defense to defeat a motion to remand the case. In this respect, the test is not comparable to that imposed by the "denial" clause, under which successful removal results in pretrial dismissal. But the federal court must be sufficiently informed to be able to discern the presence of a non-frivolous claim of privilege premised on a law providing for equal rights which, if proved, will entitle the defendant to acquittal.

We advert, in conclusion, to a possible concern based on the procedural difficulties apprehended if a number of State criminal prosecutions are transferred to the federal courts. The short answer is that those questions are premature. Again, we invoke the opinion of the Court in *Tennessee* v. *Davis*, supra, 100 U.S. at 271–272:

> * * * The imaginary difficulties and incongruities supposed to be in the way of trying in the Circuit Court an indictment for an alleged offence against the peace and dignity of a State, if they were real, would be for the consideration of Congress. But they are unreal. While it is true there is neither in sect. 643, nor in the act of which it is a re-enactment, any mode of procedure in the trial of a removed case prescribed, except that it is ordered the cause when removed shall proceed as a cause originally commenced in that court, yet the mode of trial is sufficiently obvious. The circuit courts of the United States have all the appliances which are needed for the trial of any criminal case. They adopt and apply the laws of the State in civil cases, and there is no more difficulty in administering the State's criminal law. They are not foreign courts. The Constitution has made them courts within the States to administer the laws of the States in certain cases; and, so long as they keep within the jurisdiction assigned to them, their general powers are adequate to the trial of any case. The supposed anomaly of prosecuting offenders against the peace and dignity of a State, in tribunals of the general government, grows entirely out of the

division of powers between that government and the government of a State; that is, a division of sovereignty over certain matters. When this is understood (and it is time it should be), it will not appear strange that, even in cases of criminal prosecutions for alleged offences against a State, in which arises a defence under United States law, the general government should take cognizance of the case and try it in its own courts, according to its own forms of proceeding.

C. THE REMOVAL STATUTE PROTECTS ALL RIGHTS TO EQUALITY FREE OF RACIAL DISCRIMINATION, AND THE ASSOCIATED RIGHTS OF ADVOCACY AND PROTEST

In its original version, as Section 3 of the Civil Rights Act of 1866, the removal statute referred only to rights protected by Section 1 of the same law[35]—carried forward today as 42 U.S.C. 1981–1982.[36] As we have already noticed, the provision alluded to guaranteed the Negro equality in basic legal relations, including the "same right * * * to sue, be [a] part[y], and give evidence * * * as is enjoyed by white citizens," a right to the "full and equal benefit

[35] The reference in the "color of authority" clause to "the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof" (*supra*, p. 15) is irrelevant to our discussion because those enactments added nothing to the substantive or procedural rights of the freedmen. See Act of March 3, 1865, 13 Stat. 507; Act of July 16, 1866, 14 Stat. 173.

[36] For present purposes, we may ignore the broadening of what is now 42 U.S.C. 1981 to include "all persons", rather than "citizens" only, and the additional immunity from unequal "taxes, licenses, and exactions." These changes derive from § 16 of the Enforcement Act of May 31, 1870, 16 Stat. 140, 144.

of all laws and proceedings for the security of person and property," and an immunity from any "punishment, pains, and penalties" except those to which whites were subject. That plainly states a guarantee against denial of any procedural right on account of race. So much has been clear from the beginning. See *Strauder* v. *West Virginia*, 100 U.S. 303, 311–312. Thus, there can be no doubt that racially discriminatory deprivation of courtroom rights (under the "cannot enforce" clause) and unequal enforcement of the law on grounds of race (under the "denial" clause) have always been within the protection of the removal statute. The more important question is what substantive rights are included within the "color of authority" clause (and, also, in some circumstances within the "denial" clause).

For that determination, we turn to the text of the civil rights removal statute as it appeared in the Revised Statutes of 1874—which, in this respect, is essentially the same today. No one questions the propriety of abandoning the 1866 provision for this purpose. Nor is there any basis for objection. That the original text referred alone to the Act of 1866 was quite natural, since, at the time, it was the only law conferring rights of equality. The removal provisions of the Civil Rights Act of 1866, however, were adopted by reference in subsequent civil rights legislation[a] and it was appropriate for the Revisers of

[a] See § 18 of the Enforcement Act of May 31, 1870, 16 Stat. 140, 144; §§ 1 and 2 of the Ku Klux Act of April 20, 1871, 17 Stat. 13–14.

1874 to define the rights protected by employing generic language. Besides, the provision of 1874 has stood unchallenged for almost a century and (to paraphrase the words of Mr. Justice Holmes in a comparable case) "we cannot allow the past so far to affect the present as to deprive citizens of the United States of the general protection which on its face [Section 1443] most reasonably affords." *United States* v. *Mosley*, 238 U.S. 383, 388. That statute (R.S. § 641) speaks of "right[s] secured" by, or acts done "under color of authority" of, "any law providing for equal [civil] rights." The question is what "laws" are included.

We think it unnecessary to now decide the full sweep of those words. It is sufficiently clear that they describe, generically, an open-ended category, including at least all laws which are couched in terms of equality. Among these are the following provisions of Title 42 of the United States Code: Section 1971 (barring voting discrimination on account of race); Section 1981 (granting equal procedural rights and equal rights to make and enforce contracts and guaranteeing equal protection of the laws); Section 1982 (granting equal rights with respect to real and personal property); Section 1985(3) (prohibiting conspiracies to deprive persons "of the equal protection of the laws, or of equal privileges and immunities under the laws"); Section 2000a (granting a right to equal enjoyment of the benefits of places of public accommodation); and Section 2000e (guaranteeing equal employment opportunities). These

laws carry out the guarantees of the Equal Protection Clause of the Fourteenth Amendment and of the Fifteenth Amendment against discrimination on account of race. For present purposes, we need look no further. We have no occasion here to resolve the difficult question whether the removal statute also protects the broader category of rights secured by the Equal Protection and Due Process Clauses and other provisions of the Constitution, which are vindicated under Section 242 of the Criminal Code and its civil analogue, 42 U.S.C. 1983.

In resting our submission on laws providing for equal rights as against discrimination on account of race, we intend, however, to include all corollary rights. Without purporting to define here the limits of that "penumbra," it seems clear that the right to be free from racial discrimination in legal relations encompasses some privilege peaceably to advocate equality and to protest its denial by official action (or inaction). To be sure, the First and Fourteenth Amendments guarantee a right of expression independently of the context. But it may also be viewed as an aspect of the right to equality before the law when the advocacy or protest is proximately related to the exercise (or denial) of the underlying egalitarian guarantee—and the conduct does not overstep proper bounds. See *N.A.A.C.P. v. Button*, 371 U.S. 415, 428—431; *N.A.A.C.P. v. Alabama*, 377 U.S. 288, 360-307. In those circumstances, we submit, the removal statute is applicable.

D. THE REMOVAL PETITIONERS ARE ENTITLED TO AN OPPORTUNITY TO SHOW A RIGHT OF REMOVAL UNDER BOTH PARAGRAPHS OF SECTION 1443

We have discussed the questions presented abstractly because of the posture of the cases in this Court. Remand was ordered in the district court on the face of the pleadings, without any development of the facts which control the issue of removal. See R. 9, 70, 89–90, 92–93, 94–95. The ruling, in each instance, was predicated on a construction of Section 1443 which would authorize removal only if the petitioners could point to a State statute which was discriminatory and void on its face—no matter what other allegations or proofs were offered. See R. 13–17, 75–87. In short, the district court has never considered the question of removability under the correct standards, and it would be premature, at this stage, to attempt to finally resolve the matter with respect to each petitioner before the relevant facts are more clearly stated.

On the other hand, the petitions for removal do suggest an arguable basis for removal under both paragraphs of Section 1443 (assuming our construction of the provision). As the court of appeals concluded (R. 24), they may fairly be read to allege racially discriminatory prosecutions instituted for the purpose of harassment. See R. 4, 38–39. This allegation, if sustained on an adversary hearing, would justify removal under paragraph (1) of Section 1443 (the "denial" clause) and require dismissal of the charges. Accordingly, we agree with the court below

that the cases must be remanded to the district court for a hearing of this claim. To that extent, we submit the judgment should be affirmed.

We disagree with the court of appeals, however, insofar as it finally denied removal under paragraph (2) of Section 1443. Because of its view that this provision in no event extends to private persons who are not acting at the direction of federal officers, the court had no occasion to test the sufficiency of the removal petitions under the second paragraph. While the allegations are largely conclusory, it appears that each of the petitioners has attempted to bring himself under the "color authority" clause. See R. 4, 37, 38, 41–42, 47–63. More precise particularization of the conduct in which they were engaged at the time of their arrests and of its relation to the exercise of rights protected by the removal statute will show whether removal under Section 1443(2) is appropriate. In our view, the petitioners are entitled to an opportunity to make that showing. Doubtless, the facts will sufficiently appear on the hearing ordered under paragraph (1) of the statute. But the question is not the same; should they fail to show grounds for an outright dismissal of the charges, petitioners may yet be entitled to a removal of the cases for trial in the district court. Accordingly, we submit that, to this extent, the judgment below should be vacated to permit the district court to also consider, on remand, whether removal is proper under Section 1443(2).

CONCLUSION

The judgment below should be affirmed insofar as it directs a hearing on removability, but vacated insofar as it denies removal on an alternative ground, and the cause should be remanded to the district court for further proceedings as indicated in the preceding paragraph.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

THE CITY OF GREENWOOD, MISSISSIPPI,
Petitioner and Cross-Respondent

vs.

WILLIE PEACOCK, ET AL.
Respondents and Cross-Petitioners

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONER (Cross No. 471)

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1. Respondents' Statement Of The Questions Presented For Review

None of the questions presented for review by Respondents are applicable to the removal petitions in the Peacock case (R. 3), because:

(a). The petition does not allege, as mentioned in Question 1 A, that petitioners were doing any act "peace-

fully" and does not allege the arrest was "designed to harass and intimidate such workers";

(b). The removal petition does not allege, as mentioned in Question 1 B, "a racially-motivated arrest, charge and prosecution, designed to suppress Negro voter registration activity";

(c). The removal petition does not allege, as mentioned in Question II A, that Negroes are excluded from juries;

(d). The removal petition does not allege, as mentioned in Question II B, anything with reference to jury laws; and

(e). The petition does not allege, as mentioned in Question III, that civil rights workers were arrested and charged "for assisting Negroes to register and vote in Mississippi", and it does not allege, as mentioned in Question III, that petitioners were performing any act under color of authority derived from the Fourteenth Amendment or the Civil Rights Acts of 1957 or 1960 or anything else, and does not allege, as mentioned in Question III, that petitioners refused to do any act on the ground that so to do would be inconsistent with any federal law.

As to the petitioners in the Weathers cases (R. 36-63), we mention the following with reference to the 4 questions which Respondents state are presented for decision:

(a). The removal petition does allege that the arrests were for the purpose of harassing and punishing the petitioners and of deterring them from their right to protest racial discrimination and segregation, but it does not allege, as mentioned in Question I B, that the arrests were designed to suppress Negro voter registration activity; does not allege that they were arrested "while assisting Negroes to register to vote," as mentioned in

Question II A; does not allege that state jury laws are unconstitutional as mentioned in Question II B; and does not allege that petitioners "were arrested and charged by the State for assisting Negroes to register to vote", as mentioned in Question III.

2. Answer To Respondents' Argument That These Cases Are Removable Under 28 U. S. C. 1443(1).

Pages 9 to 32 of Respondents' brief are devoted to urging the legal proposition stated in the heading on page 9 of their brief as follows:

> "A racially-motivated arrest and charge, designed to use state law to harass and intimidate civil rights workers who are assisting Negroes in registering to vote, presents a case for removal under 28 U. S. C. Section 1443(1)."

The method of urging this proposition as law is to attack the State of Mississippi generally with statements as to statutes adopted by it in 1865 and repealed in 1867 (p. 19), by referring to a statute against obstructing public streets as a "crypto-segregationist" statute (P. 12), by criticizing the voter registration provision in Mississippi's Constitution of 1890 (upheld by this Court in Williams v. Mississippi, 170 U. S. 213, 42 L. Ed. 1012, 18 S. Ct. 583) (P. 21-2), by making arguments about the doctrine of abstension not in point here (P. 29-32), by in effect stating that the Court of Appeals has disregarded and this Court should overrule Virginia v. Rives, 100 U. S. 313, 25 L. Ed. 667, , Kentucky v. Powers, 201 U. S. 1, 50 L. Ed. 633, 26 S. Ct. 387, and Strauder v. West Virginia, 100 U.S. 303, 25 L. Ed. 664, referred to in Respondents' brief as the Rives-Powers doctrine (P. 10, 12, 17, 23, 24, 27), by claiming with no support from any case that Mississippi jury statutes are unconstitutional as a whole and that consequently all Mississippi defendants must be tried in Federal Court

(P. 32-37), by mistakenly stating that Leflore County is a defendant in a pattern and practice suit and citing as its authority for such statement U. S. v. Mississippi, 339 F. 2d 679, in which the registrar of voters of Walthall County (not Leflore County) was the defendant (P. 35), and citing at length (p. 12, 13, 24, 25, 29, 30 and 31) Dombrowski v. Pfister, 380 U. S. 479, 14 L. Ed 2d 22, 85 S. Ct. 1116, a case which does not even in a remote way relate to 28 U. S. C. 1443 or the removal jurisdiction of Federal Courts.

On pages 22 and 23 of their brief, Respondents state, without assigning any reason therefor, that a construction of 28 U. S. C. 1443(1) is justified which would have the words of the statute "cannot enforce" relate to enforcement in the courts of the state while the words "who is denied" would not relate to the courts but would apply to any person who is denied an equal civil right, whether by the State Court or by others. In other words, the Respondents seek to read the statute to justify the action of the Court of Appeals in Peacock in holding that an arrest and charge for an improper motive can make a case for removal under the removal statute without the necessity of showing that the accused "is denied or cannot enforce in the courts of such State" an equal civil right. In order to sustain the Peacock decision of the Court of Appeals, it is necessary that the statute be so read.

In the first place, the words of the statute "who is denied or cannot enforce in the courts of such State" clearly mean that the denial as well as the inability to enforce must be "in the courts of such State"; and in the second place, this Court distinctly and emphatically so construed these words in each of the cases of Strauder v. West Virginia, supra, Virginia v. Rives, supra, Neal v. Delaware, 103 U. S. 370, 26 L. Ed. 567, Bush v. Kentucky, 107 U. S. 110, 1 S. Ct. 625, 27 L. Ed. 354,

Gibson vs. Mississippi, 162 U. S. 565, 16 S. Ct. 904, 40 L. Ed. 1075, Smith v. Mississippi, 162 U. S. 592, 16 S. Ct. 900, 40 L. Ed. 1082, Murray v. Louisiana, 163 U. S. 101, 16 S. Ct. 990, 41 L. Ed. 87, and Kentucky vs. Powers, supra.

In addition, in each of these cases this Court construed the statute as not only meaning that both the denial and inability to enforce must be "in the Courts of such State" but that in addition such denial or inability to enforce in Court must result from the Constitution or statutes of the state and not from acts of officers of the state. It was expressly and clearly so stated and held in our quotations from these cases set forth on pages 19 through 36 of our original brief.

As stated in Virginia v. Rives, supra:

> "But when a subordinate officer of the State, in violation of state law, undertakes to deprive an accused party of a right which the statute law accords to him, as in the case at bar, it can hardly be said that he is denied, or cannot enforce 'in the judicial tribunals of the State' the rights which belong to him. In such a case it ought to be presumed the Court will redress the wrong."

We think it pertinent to note that in each of the cases of Virginia v. Rives, Neal v. Delaware, Bush v. Kentucky, Gibson v. Mississippi, Murray v. Louisiana, and Kentucky v. Powers, both the charge and arrest of the defendants were improper and deprived them of an equal civil right because the charge was by a grand jury deliberately selected by state officers in violation of federal statutes and constitutional provisions providing for the equal rights of citizens, and in each of these cases the venire summoned to try the defendants were selected in the same improper way. Yet, in each of those cases this Court held the case not to be removable because the denial of the defendants' rights was not in the State Court by reason of a law of the State.

In view of these decisions and their clear reasoning, we submit there is no limit in an argument that a case is removable under the statute because a subordinate officer, to-wit, a policeman, is alleged to have made an arrest and brought a charge from an improper motive. This does not disclose a denial or inability to enforce any equal civil right "in the courts of such State" and most certainly does not disclose a denial or inability by reason of the state constitution or statutes to enforce any equal civil rights "in the courts of such State". In the words of this Court, "it ought to be presumed the court will redress the wrong", if wrong there be.

In answer we say this:

1. In order to adopt the proposition of law urged by Respondents, this Court will have to overrule Strauder v. West Virginia, Virginia v. Rives, Neal v. Delaware, Bush v. Kentucky, Gibson v. Mississippi, Smith v. Mississippi, Murray v. Louisiana, Kentucky v. Powers, and the numerous decisions of the lower Federal Courts cited at page 36 of Petitioners' original brief herein. This Court would have to overrule the holding of those cases that the denial or inability to enforce must be in the courts of the State, and also the holding of those cases that the denial or inability to enforce in State Court must be due to the Constitution or statutes of the state, and also the holding of those cases that the acts of state officers in advance of trial will not entitle the accused to remove to Federal Court. If the acts of state officers in advance of trial are sufficient under the removal statute to justify the removal of cases from State Court to Federal Court, then this Court could not have held non-removable the petitions in the above cases beginning with Virginia v. Rives and running through Kentucky v. Powers.

2. In our original brief, at pages 50 and 51 thereof, we mentioned the fact that, after the above construction had been repeatedly placed on the removal statute by this and other Federal Courts, Congress acquiesced therein by reenacting the statute without significant change in its language and by actually considering the removal statute and providing by amendment that remand orders under the removal statute should be reviewable on appeal but making no change in the form of the removal statute itself.

Since filing our original brief, it has come to our attention that, when the Civil Rights Act of 1964 was under consideration in Congress, the Hon. Benjamin Smith and Hon. George Crockett, two of Respondents' attorneys herein, appeared with a Mr. William Higgs, before the Committee of the House of Representatives considering the legislation, and recommended that Congress amend 28 U. S. C. 1443 so as to make the law be what the Court of Appeals decided in the case at bar and what Respondents now ask this Court to decide the statute means; but Congress did not so amend the statute. (Part III, Serial No. 4, of Hearings Before Subcommittee No. 4 of the Committee of The Judiciary, House of Representatives, Eighty-Eighth Congress, First Session On Miscellaneous Proposals Regarding The Civil Rights Of Persons Within The Jurisdiction Of The United States, pages 1814-1830).

The specific amendment to 28 U. S. C. 1443 advocated by these gentlemen was the bill introduced in Congress by Mr. Kastenmeir (H. R. 7702) set out at page 1829 of said Part III and also at page 904 of Part I of said Hearing as proposed Section 903 of said H. R. 7702 reading as follows:

> "Sec. 903. Title 28, United States Code, section 1443, is amended by the addition of the following paragraphs:

"The right of removal under this section shall be freely sustained; and this section shall be construed to apply to any State action (executive, legislative, administrative, or otherwise) having the effect of denial or abridgement of equal rights.

'An order remanding a case to the State court from which it was removed under this section shall be reviewable by appeal or otherwise, notwithstanding the provisions of section 1447(d) of this title.'"

In the material filed with the Sub-Committee by Mr. Smith and the other gentlemen appears the following statement:

"... The present civil rights removal statute (title 28, United States Code 1443) has been so restrictively interpreted (as a matter of statutory construction, not as a lack of congressional power under the Constitution, Virginia v. Rives, 100 U. S. 313 (1879)) that its use has been almost totally limited to cases where the State constitution or State statutes deny or create the inability to enforce a citizen's equal rights. The proposed amendment would explicitly extend the right of removal in cases of denial or abridgment of equal rights to any situations brought about by State action of any kind. This extension should cover the recent arrests and prosecutions in Greenwood, Birmingham, Jackson, and elsewhere." (p. 1829 of said Part III)

It thus appears that Congress considered and rejected a proposed amendment of 28 U. S. C. 1443 to overturn the construction of the statute by this Court in Virginia v. Rives, supra, and to provide precisely for what Respondents here contend and what the Court of Appeals held in Peacock, i. e., that a racially-motivated arrest and charge is sufficient to remove a case to Federal Court without the necessity of showing what the present statute

requires, namely, that they will be denied or cannot enforce "in the Courts of such State" by reason of state law a right under any law providing for the equal civil rights of citizens.

We respectfully submit that this Court should not do what Congress has refused to do.

3. The reasons for Congress refusing to overturn Virginia v. Rives, supra, are not hard to find. The rules of law urged by Respondents and adopted by the Court of Appeals in Peacock is a mischievous rule in that it will undermine both the Federal and the State court system. Under it, all defendants in criminal cases and many defendants in civil cases can remove their cases to Federal Court for at least one trial to examine the motives of the prosecution in a criminal case or of the plaintiff in a civil suit and then for a possible second trial in Federal Court to determine the guilt or innocence or liability of the defendant. Obviously, it will clog the dockets of the U. S. District Court with police court cases such as those in the Weathers and Peacock cases; and, equally as obviously, it will place on small municipalities and others an absolutely insupportable burden of transporting witnesses and hiring lawyers to prosecute their police court cases in a United States Court. Under such circumstances, a real breakdown in law and order in many communities can be confidently expected.

And it is asked that all of this damage be done on the theory that the Federal Courts are the sole repositories of all justice and that a defendant should not be tried in a State court because such courts will not recognize or permit him to enforce his civil rights.

3. These Cases Are Not Removable Under 28 U. S. C. 1443(2)

The portion of Respondents' brief devoted to arguing these cases are removable under 28 U.S.C. 1443(2) begins at page 37.

No authority is, or can be, cited by Respondent to sustain their contention that 28 U.S.C. 1443(2) is applicable to the case at bar because all of the authority is to the contrary. Instead, Respondents reason as follows:

First, Respondents incorrectly state that the Attorney General had determined that there existed a pattern and practice of racial discrimination in voting in Leflore County, citing U. S. v. Mississippi, 380 U.S. 128 (229 F. Supp. 925) (p. 38). No evidence was introduced in that case, and in addition all that the complaint in that case charged the Registrar of Voters of Leflore County with doing was applying the state law which was alleged to be unconstitutional.

Next, Respondents incorrectly state that the Attorney General had filed suit against the Registrar of Voters of Leflore County to declare a pattern and practice to exist, citing U. S. v. Mississippi, et al., 339 F. 2d 679 (p. 38). Counsel is mistaken. This suit relates to Walthall County and not Leflore County; and Walthall County is even in a different section of the State from Leflore County.

Next, Respondents incorrectly state, or in any event infer, that a SNCC worker had been pistol-whipped in the courthouse of Leflore County by the Registrar of Voters, citing U. S. v. Wood, 295 F. 2d 772. (p. 38-9). This incident took place in Walthall County and not in Leflore County; and Mrs. Martha Lamb, Registrar of Voters of Leflore County for more than the last 15 years, has never been accused of committing violence on anyone.

On the basis of these incorrect statements and despite the lack of any allegation with reference to them in the removal petitions herein, Respondents then state that because of them Willie Peacock and his SNCC co-workers were members of a "posse comitatus" (p. 39). Without any support from any allegation of fact in the removal petitions herein, Respondents state that on account of the above incidents, incorrectly stated in the brief to have occurred in Leflore County, Negroes were afraid to go to the Courthouse in Leflore County to register (p. 39); and then, still without any support from the removal petitions herein, they state that Willie Peacock et al. were accompanying these frightened would-be registrants to the courthouse at the time of their arrest and were therefore helping the Federal Government and thus acquired "color of authority" (p. 39).

There is no reason for us to argue these "posse comitatus" and "color of authority" theories for the reason that they are based on incorrect statements of fact which find no support in the removal petitions; and the sole question in the case at bar is whether the removal petitions allege sufficient facts to make out a case for removal under 28 U.S.C. 1443. The very paucity of allegations of fact in the removal petitions compel Respondents to try to supplement them by resorting to Walthall County.

Respondents then quote the last part of Section 1443 (2) with reference to "refusing to do any act on the ground that it would be inconsistent with such law," state that it is curious that the Peacock opinion does not mention it, and again advert to the so-called Black Codes which they have previously stated were repealed in 1867. (p. 39-43)

The Peacock case did not discuss this language at length because Respondents in the Court of Appeals aban-

doned any contention that it applied to them, as they had to do because there is not one word in the Peacock petition (R. 3) upon which to base any finding that Respondents refused to do any act.

So far as we can ascertain, every court which has considered 28 U. S. C. 1443(2) has expressly held against Respondents' contentions; and the petitions for removal herein do not under any of these cases contain allegations which would make the cases removable under 1443(2). New York vs. Galamison, 342 F. 2d 355, (Second Circuit), cert. den. 380 U. S. 977, 85 S. Ct. 1342, 14 L. Ed. 2d 272; City of Chester vs. Anderson et al, 347 F. 2d 823 (Third Circuit); Peacock et al, vs. City of Greenwood, Mississippi, 347 F. 2d 679 (Fifth Circuit); Arkansas vs. Howard, 218 Fed. Supp. 626 (Arkansas D. C.).

28 U. S. C. 1443 was first enacted as a part of the Civil Rights Act of 1866, 14 Stat. 27. Section 1 of that act, now 42 U. S. C. A. 1981, declared Negroes to be citizens, conferred upon them various rights of citizenship, and guaranteed them the full and equal benefit of all laws and proceedings for the security of person and property as were enjoyed by white citizens. Section 2 made it a crime to deprive persons of rights secured by the Act. Section 3 was the removal statute. Section 4 through 10 were devoted to the matter of the arrest and prosecution of persons violating Section 2; and these sections authorize Federal Commissioners to appoint suitable persons to serve warrants and allowed the persons so appointed to "summon or call to their aid the bystanders or posse comitatus of the proper county . . ." The first sentence of Section 3 of the Act is as follows:

> "And be it further enacted, That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offenses committed against the provisions of this act, and

also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any such person, for any cause whatsoever, or against any officer, civil or military, or other persons, for any arrest or imprisonment, trespasses or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof, or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the 'Act relating to habeas corpus and regulating judicial proceedings in certain cases,' approved March three, eighteen hundred and sixty-three, and all acts amendatory thereof. * * *"

Section 3 of the act became Section 641 of the Revised Statutes of 1875 and 1878 and is set out in Petitioners original brief herein in Appendix I page 67. No material change was made in the language of the act until the 1948 Codification of Title 28 when the words "against any officer" etc., were omitted and the words "arrest, imprisonment, wrongs, or trespass" were shortened to "any act under color of authority". The 1948 Reviser's note "changes were made in phraseology" apparently disclaimed any intent to change the meaning of the statute. H. R. Rep. No. 308, 80th Cong., 1st Session A 134.

As stated by the Court of Appeals below in Peacock in speaking of Section 3 of the Act:

"Paragraph (2) of 1443 had its genesis in the Civil Rights Act of 1866, 14 Stat. 27, where the

operative language allowed removal of suits and prosecutions 'against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act * * *' or the Freedmen's Bureau legislation. This language survived in substance until the 1948 revision when the statute was recast in its present form, with all reference to the categories of persons being deleted. The 1948 reviser's note disclaimed any intention to change the substance of the section, and in view of this, we feel that the more expansive language contained in the earlier enactments furnishes an appropriate guide to the true meaning of the section. Cf. Madruga v. Superior Court, 1954, 346 U. S. 556, 560 & n. 12, 74 S. Ct. 298, 98 L. Ed. 290, 296." See H. R. Rep. No. 308, 80th Cong., 1st Sess. A 134 (1947) . . .

"When § 1443(2) is reviewed in this perspective, it is plain that Congress was primarily concerned with protecting federal officers engaged in enforcement activity under the 1866 Act and the Freedmen's Bureau Legislation. The use of the more inclusive 'officer * * * or other person' language is explained by the need to protect by-standers, members of the posse comitatus and other quasi-officials as well. Moreover, the language 'for any arrest or imprisonment, trespasses, or wrongs * * * committed * * * under color of authority derived from this act' strongly suggests enforcement activity. Had Congress intended to allow removal by someone merely exercising an equal civil right, as appellants contend, it would have been quite simple to use the term 'any person', as indeed was used in § 1443(1), rather than the limited 'officer * * * or other person'".

"Thus, we feel that the original language and context of § 1443(2) compel the conclusion that that section is limited to federal officers and those assisting them or otherwise acting in an official or quasi-official capacity."

The U. S. District Court below reasoned as follows:

"The specific issue here is whether petitioner has alleged facts from which it can be said that she is being prosecuted for acts done under color of authority derived from any law providing for equal civil rights, within the meaning of 28 U. S. C. § 1443(2). 'Color of authority' is a phrase (fol. 877) of art in the law. It is defined in 15 C. J. S., Color, p. 235, as follows:

> Color of authority. Authority derived from an election or appointment, however, irregular or informal, so that the incumbent be not a mere volunteer.

From this accepted meaning of this phrase, removal is not available under subsection (2) unless the act for which the state prosecution is brought was done in at least a quasi-official capacity derived from a law providing for equal rights. Neither the constitution nor the statutes cited by petitioner purport to grant her any authority to act in any official capacity so as to entitle her to remove a state prosecution instituted because of such acts. The mere exercise of rights created or protected by federal civil rights statutes does not spread a cloak of immunity from state prosecution over persons who, by the acts involved in such exercise of their equal civil rights, also violate state law.

"The almost total absence of judicial interpretation of subsection (2) lends credence to this view. During its century of existence, subsection (2) and its predecessors have not been regarded by the bench and bar as authorizing removal in the circumstances here." (R. 84)

It seems clear from its original language that the statute which is now 28 U. S. C. 1443(2) only applied to officers and persons assisting them for arrests and other acts performed by them under color of authority of

the statute or the act establishing the Freedmen's Bureau. The phrase "for refusing to do any act", mentioned by Respondents, referred to officers, Federal or state, civil or military, and those called to their assistance. In view of the limited scope of this statute, it is most significant that the Reviser in 1948 referred to the changes in the section as semantic rather than substantive. It is inconceivable that such note could have been made if it had been intended to make the revolutionary changes in the federal and state court systems for which Respondents contend.

In Galamison, the Court of Appeals for the Second Circuit expressly pretermitted a decision of the question decided in Peacock that 1443(2) was limited to Federal officers and those assisting them or otherwise acting in an official or quasi-official capacity, but in a finely reasoned opinion, Galamison held:

> "When the removal statute speaks of 'color of authority derived from' a law providing for equal rights, it refers to a situation where the lawmakers manifested an affirmative intention that a beneficiary of such a law should be able to do something and not merely to one where he may have a valid defense or be entitled to have civil or criminal liability imposed on those interfering with him".

And in City of Chester the Court of Appeals for the Third Circuit quited Galamison and held:

> "A private person claiming the benefit of Section 1443(2) . . . must point to some law that directs or encourages him to act in a certain manner, not merely to a generalized constitutional provision that will give him a defense or to an equally general statute that may impose civil or criminal liability on persons interfering with him."

As we understand the opinion in Peacock, the Court of Appeals below adopted the Galamison rule that a person

claiming the benefit of Section 1443(2) must point to a specific Federal statute or order that directs him to act as he did, but that in addition such person must also have acted in some official or quasi-official capacity.

With reference to the phrase "any person" appearing in the statute, the following reasoning of the Galamison opinion is persuasive:

> "One begins with the troubling question why if 'other person' in fact meant 'any person', Congress did not simply repeat in the second or 'authority' clause of Sec. 3 of the Act of 1866 and Sec. 641 of the Revised Statutes, these words which it had already used in the first or 'denial' clause. Next, since the first clause was directed only toward freemen's rights, symmetry would suggest that the second clause concerned only acts of enforcement. 'Arrest or imprisonment, trespasses, or wrongs', were precisely the probably charges against enforcement officers and those assisting them; and a statute speaking of such acts 'done or committed by virtue of or under color of authority derived from' specified laws reads far more readily on persons engaged in some sort of enforcement than on those whose rights were being enforced, as to whom words like 'acts founded upon' would have been much more appropriate. The inclusion of 'or other person' can readily be explained without going so far as appellants urge. In anticipation of massive local resistence Congress devoted Sections 4-10 of the Civil Rights Act of 1866 to provisions compelling and facilitating the arrest and prosecution of violators of Section 2, the criminal sanction for Section 1 rights. These sections authorized and required district attorneys to prosecute under Sec. 2, fined marshals who declined to serve warrants, authorized federal commissoners to 'appoint, in writing . . . any one or more suitable persons, from time to time' to serve warrants, empowered the persons so appointed 'to summon and

call to their aid the bystanders or posse comitatus of the proper county, or such portion of the . . . forces of the United States' as was needed, and made interference with warrant service a further federal crime. Although the 'one or more suitable persons' might be deemed 'officers' the bystanders and the posse comitatus were not, and were surely among those covered by 'other persons'. The argument for a limited construction of 'other person' in the 'authority' clause is aided by the consideration that the 1866 Act conferred original jurisdiction only for the 'denial' category. The freedmen would need that resource, whereas officers and persons acting under or in aid of them normally would not. Finally, the derivation of Sec. 3 of the 1866 Act from Sec. 5 of the Habeas Corpus Act of 1866, see fn. 5, argues against appellants' broad construction. The 'any other person' in the 1863 act was someone who had been deputized by the President or by Congress to do something, not a person asserting his own rights. It is rather logical to assume that Congress had the same kind of 'person' in mind when it used the same phrase in the Civil Rights Act of 1866 and repeated it in Sec. 641 of the Revised Statutes."

This same reasoning was adopted by the Court of Appeals below (pages 685-6 of 347 F. 2d 679) in holding against cross-petitioners.

Regarding whether any of the general civil rights statutes or any statute alleged in the petitions for removal or the equal protection clause of the federal constitution confer any authority or can confer 'color of authority', the argument that seems to cross-respondent to settle the issue is simply that this phrase has never been considered in any context to have meant what cross-petitioners contend and such a construction has even been rejected in relation to a statute from which Section 1443(2) was derived. See *Bigelow* vs. *Forrest*, 76 U.S. (9 Wall.) 399,

348-49 (1869) and the statement of the *Galamison* court to this effect, to-wit:

> "A Court much closer to the Reconstruction legislation than we are, Bigelow v. Forrest, 76 U.S. (9 Wall.), 339, 348-49 (1869), applying the removal petition provision of the Habeas Corpus Act of 1863, see fn. 5, decided squarely that even when there was a specific statute or presidential order, not every act deriving its foundation therefrom was 'under color of authority' of the statute or order for removal purposes."

And as further pointed out in Galamison:

> "We gain a valuable insight into the meaning of 'color of authority' if we reflect on the cases at which Sec. 1443(2) was primarily aimed and to which it indubitably applies—acts of officers or quasi-officers. The officer granted removal under Sec. 3 of the Civil Rights Act of 1866 and its predecessor, Sec. 5 of the Habeas Corpus Act of 1863, would not have been relying on a general constitutional guarantee but on a specific statute or order telling him to act. Cf. Hodgson v. Millward, 12 Fed. Cas. 568 (No. 6) (C. C. Pa. 1863), approved in Braun v. Sauerwein, 77 U. S. (10 Wall.) 218, 224 (1869). A private person claiming the benefit of Sec. 1443(2) can stand no better; he must point to some law that directs or encourages him to act in a certain manner, not merely to a generalized constitutional provision that will give him a defense or to an equally general statute that may impose civil or criminal liability on persons interfering with him."

The petitions in the case at bar are insufficient to make a case for removal under either the rule adopted by the Court of Appeals in Peacock or that adopted by the other Courts of Appeal in Galamison and City of Chester. The petition in Peacock (R. 3) alleges no acts of any kind. In addition, the petitions in both the Peacock case

(R. 3) and the Weathers case (R. 36) are insufficient because neither of them alleges (1) the requisite official or quasi-official capacity under the rule adopted by the Fifth Circuit in Peacock or, (2) any act which could have been performed under color of authority of any of the Federal statutes alleged as required by the rule in Galamison and City of Chester.

The effect of giving 1443(2) the vast scope contended for by Respondents will be so devastating to both the Federal and State court systems that we submit any such change should not be made by this Court but should be left to Congress. This effect was so graphically illustrated by the U. S. District Court below in its opinion in Clarksdale vs. Gertge, that we quote from that portion of the opinion beginning on page 85 of the record:

> "The difficulty with petitioner's construction of the statute is that it proves too much. Adoption of petitioner's view would so extend the operation of subsection (2) that it would eliminate, as a practical matter, the functions of the state courts. For example, the first statute cited by petitioner, 42 U.S.C. Sec. 1981, reads as follows:
>
> > All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.
>
> It must be noted first that the guilt or innocence of the petitioner is immaterial. That issue would not be open for consideration until it had first been determined that this court had jurisdiction. With this in mind, it must be observed that Sec. 1981

grants to all persons within the jurisdiction of the United States a guaranty of equal protection of the law. In effect, it is the implementing statute of the equal protection clause of the Fourteenth Amendment. Under petitioner's view, any person who exercised a right so protected, and for such exercise was prosecuted in the state court, would be entitled to remove under subsection (2). Thus, the 'laws and proceedings for the security of per- (fol. 879) sons' to which all persons shall have the same right generally include the right to use necessary force in self defense when attacked. If the mere exercise of such a right entitles one to removal of a state prosecution brought because of that act, then any person charged with assault and battery who relied on self defense as a defense would be entitled to remove, regardless of his guilt or innocence.

Such a construction seems absurd. Perhaps petitioner would modify it by reading in limitations to prevent the extreme application illustrated. Such limitations might include the existence of local prejudice against the petitioner, proof of discriminatory practices of local authorities against the class of which petitioner is a member, the character of the activity in which petitioner was engaged when the alleged crime was committed, or even the motivation of the prosecutor in bringing the action. Insofar as such modifications suggest that removal would be available to only a particular class of state criminal defendants, possible issues of constitutional propriety are raised. It is enough to say, however, that such modifications are so speculative with respect to the probable intent of Congress that they should issue from that branch of the government rather than this.

This court is of the opinion that Congress did not intend such a strained, impractical construction of the statute, but rather intended to follow the accepted

use of the phrase, 'color of authority', granting the right of removal to persons (fol. 880) acting in an official or quasi-official capacity."

Respectfully submitted,

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CERTIFICATE

The undersigned counsel of record for the petitioner and cross-respondent, The City of Greenwood, Mississippi, hereby certifies that a true copy of the foregoing brief of petitioner has been this day forwarded by United States air-mail, first-class postage prepaid, to Benjamin E. Smith and Jack Peebles, of the firm of Smith, Waltzer, Jones and Peebles, 1006 Baronne Building, New Orleans, Louisiana, attorneys of record for the respondents and cross-petitioners.

This the ..... day of April, 1966.

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